United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED NOV 14 1957

Joseph W. Stewart
CLERK

No. 14,205

9777

CADILLAC PUBLISHING COMPANY, INC.,
A Corporation,

Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General,

and

MAURICE H. STANS,
Deputy Postmaster General,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,205

CADILLAC PUBLISHING COMPANY, INC.,
A Corporation,

Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General,

and

MAURICE H. STANS,
Deputy Postmaster General,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX FOR APPELLANT

INDEX

	Page
Complaint in the District Court	2
Complaint Ex. C, Rule 11/6/52	9
Complaint Ex. E, Rule 1/20/54	11
Complaint Ex. F, Letter 4/22/54	16
Defendant's Answer	17
Motion for Injunction Pendente Lite	19
Exhibit A - List of Publishers	23
Exhibit B - Letter to Post Office Department, 8/5/57	27
Exhibit C - Reply of Post Office Department	28
Affidavit of Louis Shapiro	29
Motion for Summary Judgment	32
Cross-Motion for Summary Judgment	34
Transcript of Hearing	35
Opinion	66
Order	69
Stipulation	69
Notice of Appeal	71
Solicitor's Papers:	
Complaint before Hearing Examiner	71
Amended Answer	73
Motion for Subpoenas or depositions	76
Transcript of the evidence	79
Initial Decision	133
Motion to Dismiss Appeal	138
Order denying motion	140
Final Departmental Decision	141
"Unlawful" Order	149

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CADILLAC PUBLISHING COMPANY, INC. a Corporation, 220 Fifth Avenue New York, New York Plaintiff	:	
v.	:	Civil Action No. 1667-57
ARTHUR E. SUMMERFIELD Postmaster General of the United States and MAURICE H. STANS Deputy Postmaster General Post Office Department Washington, D. C. Defendants	:	

Docket Entries

Date	Proceedings
1957	
July 3	Complaint.
July 18	Stipulation as to mail arriving at Post Office, New York, New York, addressed to Plaintiff.
Aug. 27	Motion of Plaintiff for injunction pendente lite.
Aug. 30	Answer of Defendant to Complaint.
Sept. 26	Motion of Plaintiff for summary judgment.
Oct. 2	Cross motion of defendant for summary judgment.
Oct. 4	Opinion of the Court.
Oct. 9	Order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment and dismissing complaint.
Oct. 16	Notice of Appeal.
Oct. 18	Order directing clerk to file in U.S. Court of Appeals the entire original record.
Oct. 24	Transcript of proceedings of 10-3-57, pp 1 to 47.
Nov. 1	Record on appeal delivered; deposited by Horace J. Donnelly, Jr.

27 [Filed July 3, 1957]

COMPLAINT FOR INJUNCTION

1. Plaintiff is a corporation duly organized, incorporated and existing under the laws of the State of New York, with its principal office and place of business located in New York, New York. Defendants are the duly commissioned Postmaster General of the United States and the Deputy Postmaster General, respectively, both being commorant in the District of Columbia.

2. Jurisdiction of this Court is based upon Section 306 of Title 11, D. C. Code, 1951 Edition, and this action arises under Articles I and V of the Amendments to the Constitution of the United States; the Judiciary and Judicial Procedure Act of June 25, 1948, 62 Stat. 930 (28 USCA 1331); the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, as amended (5 USCA 1009); and the Act of August 16, 1950, Ch. 721, 64 Stat. 451 (39 USCA 259a).

3. Plaintiff is a reputable publishing company engaged in the publication and distribution of works of numerous authors on a variety of subjects, some of which are advertised and sold through the United States mails, including among others a work entitled "The Illustrated Encyclopedia of Sex", which is the only title involved in Defendants' action hereinafter described. Plaintiff has a large and substantial investment and interest in the aforesaid publishing business, in which

28 Plaintiff's right to use of the facilities of the Post Office Department, is a necessary, important and indispensable part.

4. Under date of June 28, 1957 Defendant Maurice H. Stans unlawfully and capriciously issued Post Office Department Order No. 56390 directing the Postmaster at New York, New York to return all letters and all other mail matter arriving at the latter's office and directed to the Cadillac Publishing Company, Inc., to Postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof with the word "Unlawful" stamped thereon and did further forbid said Postmaster to pay any postal money order drawn to the order of said Cadillac Publishing Company, Inc. A copy of said

"Unlawful" order in which Plaintiff is charged with a violation of the administration postal statute prohibiting obscene material (39 USC 259a) is attached hereto as Exhibit "A".

5. Plaintiff does not deal, and has not dealt in the past in any publications of an obscene nature, as Defendants well know, for during the five years last past, Plaintiff has twice been compelled to answer charged brought against it before the Office of Hearing Examiners of the Post Office Department by Defendant's subordinates -- the Solicitor of that Department and his assistants -- involving the same subject matter, and in each case Plaintiff has successfully defended itself against such charges. In the first case (Office of Hearing Examiners Docket No. 1/244), the Solicitor's complaint was dismissed on August 21, 1952, by the initial decision of the Post Office Department's hearing examiner. The subject matter of the complaint was Plaintiff's advertising and sale through the mails of an authentic and valid treatise authored by professional medical authorities, entitled "The Illustrated Encyclopedia of Sex." The charge made by the Solicitor against such activitiy was, in effect, that because the book was not obscene, Plaintiff was obtaining remittances through the mails for same by means of false and fraudulent pretenses, representations and promises, in violation of Sections 3929 and 4041 of the Revised Statutes (39 USC 259 and 732). The hearing examiner's initial decision, under the rules of practice promulgated by
29 the Postmaster General for that office, became final and no further action was taken.

6. Thereafter, under date of February 24, 1953, Defendant, allegedly acting through the Acting Solicitor for the Post Office Department, instituted a new action (H.E. Docket No. 2/16) before the Office of Hearing Examiners for the Post Office Department, by filing a complaint charging Plaintiff with conducting through the mails in the advertising and sale of the aforementioned book, "The Illustrated Encyclopedia of Sex," an unlawful enterprise in violation of the obscenity provisions of 39 U.S. Code 259a. Plaintiff filed an answer denying said charges and

setting up various other affirmative defenses. On June 16, 1953, a hearing was held before Edward Carlick, Esq., a Hearing Examiner assigned to hear the case by order of the Chief Hearing Examiner for the Post Office Department. After certain interlocutory proceedings, the said Hearing Examiner on October 29, 1953, issued his initial decision dismissing the complaint for failure of the complainant-Solicitor to set forth facts sufficient to constitute a violation of the invoked statute. A copy of said initial decision is attached hereto as Exhibit "B" and made a part hereof.

7. Under date of November 5, 1953, the Solicitor for the Post Office Department filed with the Office of Hearing Examiners a notice of intention to appeal to the Postmaster General from the Hearing Examiner's decision, and under date of November 27, 1953, filed a brief on appeal. Plaintiff thereupon filed a motion to dismiss complainant's appeal and to strike his notice of intention to appeal and his appeal brief, on the ground that the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, dated November 6, 1952 (a copy of which is attached hereto as Exhibit "C" and made a part hereof), and under which the proceedings up to that time had allegedly been conducted, did not provide for an appeal by the Solicitor
30 from an adverse decision of the Office of Hearing Examiners. Subsequently, Plaintiff was served with a paper dated February 15, 1954, signed by a Deputy Postmaster General, denying Plaintiff's motion, and fixing a date for the filing of Plaintiff's reply to the Solicitor's appeal from the initial decision of the hearing examiner. A copy of this order is attached hereto as Exhibit "D" and made a part hereof. At or about the same time, Plaintiff was furnished with a document headed "Rules of Practice in Proceedings Under the Administrative Procedure Act. . . Amended Effective January 20, 1954," a copy of which is attached hereto as Exhibit "E" and made a part hereof, and in which an appeal procedure is attempted to be established permitting the Solicitor to appeal to a

Deputy Postmaster General from a hearing examiner's decision against the Solicitor's complaint. Attached to said document is a copy of an order of the Postmaster General, delegating all of his quasi-judicial authority to issue "fraud" and "unlawful" orders to said Deputy Postmaster General, who in turn, by administrative order, constituted his Administrative Assistant as the person responsible for the handling of such appeals, notwithstanding the language of Sections 259a and 732 of Title 39, U.S. Code, reading "upon evidence satisfactory to the Postmaster General." Subsequent to the receipt of such order and new rules as aforesaid, Plaintiff, at all times reserving its objection to such proceeding as a matter of law, was granted extensions of time to permit negotiations of settlement and compromise between Plaintiff and the Solicitor of the Post Office Department, looking to a disposition of the matter without further proceedings - Plaintiff having advised said Solicitor that notwithstanding the hearing examiner's decision in its favor, in the interest of cooperation with a government agency it would voluntarily eliminate the cause of the Solicitor's original complaint in the action. Thereafter, under date of April 22, 1954, the Solicitor for the Post Office Department, one Abe McGregor Goff, notified Plaintiff's counsel
31 that such disposition was not satisfactory and submitted an affidavit for execution by Plaintiff, in which, as demanded by the said Solicitor, Plaintiff would discontinue the sale of its book except under terms dictated by the said Solicitor, whereby sales would be made only to professional readers or on the prescription of a physician. A copy of the Solicitor's said letter is attached hereto as Exhibit "F" and made a part hereof. Plaintiff rejected such demands.

8. Under date of April 12, 1956 Plaintiff under objection but pursuant to the order of the Defendant Deputy Postmaster General did file in the Office of Hearing Examiner of the Post Office Department its brief in answer to the Assistant Solicitor's brief on appeal to the Postmaster General from the initial decision of the Hearing Examiner dismissing the complaint after hearing, as aforesaid. Said appeal was

thereupon adjudicated by the Defendant, Deputy Postmaster General Maurice H. Stans as exemplified by a document entitled "Final Departmental Decision of the Deputy Postmaster General Upon Appeal" dated June 28, 1957, a copy of which is attached hereto as Exhibit "G" and in which, without notice or opportunity for hearing the said deputy Postmaster General arbitrarily asserted a new and different specification of charges, not contained in the original complaint, and without any substantial, or credible evidence sufficient to bring his action within the meaning of the statute invoked (39 USC 259a). Namely "is obtaining -- remittances of money -- through the mails, -- or is depositing -- in the United States mails information --", - made findings and conclusions contrary to law and fact as the basis for his reversal of the Hearing Examiner's initial decision, - there being no evidence of record before said Deputy Postmaster General that plaintiff at the time of said decision, or during the period from June 16, 1953, when the original Hearing Examiner's hearing was held, had advertised the book in the independent publications referred to in the aforesaid "Final Departmental Decision" (Exhibit G).

9. The action of the Deputy Postmaster General in issuing his decision and "Unlawful" order (Exhibit "G" and "A" prespectively) is unlawful and invalid in that he has no authority or jurisdiction over the subject matter or the Plaintiff in the proceedings initiated and adjudicated before the Office of Hearing Examiners, - there being no valid rule or law in existance which confers upon the Deputy Postmaster General, the authority and jurisdiction to decide the issues, and any attempt to confer such authority or jurisdiction upon him by subsequent and unlawful amendment of the Rules of Practics is invalid and without force and effect. Plaintiff further avers that said Rules of Practice effective January 20, 1954, are not applicable to Plaintiff in the proceedings commenced against it on February 24, 1953, in that said Rules (Exhibit "E") have never been published in the Federal Register as required by law, and no general notice of the proposed making of said rules of practice was published in the Federal Register, and, therefore, have no force

and effect as valid rules of procedure. Further, the said rules of practice effective January 20, 1954 (Exhibit "E"), are an unconstitutional act of defendant and his subordinates in that same were not promulgated under the Administrative Procedure Act as claimed, and, therefore, constitute legislative rule making by an administrative agency without the authority and sanction of the Congress of the United States. Plaintiff further avers that it has been deprived of its right to due process of law and the protection of the Administrative Procedure Act, in that the prosecuting appellant (the Solicitor) and the Deputy Postmaster General are both assistants and non-independent advisors to the Defendants, are administrative officials under the full control and supervision of the Defendant, and that thus there is no separation of prosecuting and adjudicating functions as required by law for the protection of citizens administratively charged with a violation of laws committed to a
33 government agency for enforcement by the imposition of sanctions which could destroy Plaintiff's business and deprive Plaintiff of its property without due process of law.

10. Plaintiff avers that the action of the subordinate officials of the Post Office Department under Defendant Summerfield's supervision and control, namely the Defendant Deputy Postmaster General and the Solicitor, as well as Defendant's own act in attempting to delegate all of his authority fixed by statute in quasi-judicial matters, is contrary to the provisions of the Administrative Procedure Act and in violation of Plaintiff's constitutional right to due process of law. Further, Plaintiff avers that said action in compelling Plaintiff to comply with newly adopted procedures designed to cause Plaintiff to submit for a third time to the charges of Defendant's subordinates and assistants seeking to unlawfully ban Plaintiff's publications from the mails, and to create a censorship over the press contrary to the provisions of the First Amendment to the Constitution of the United States - is arbitrary, capricious, unwarranted and contrary to law, against which action Plaintiff has no adequate remedy at law.

11. Plaintiff avers that the action of the Defendant Deputy Postmaster General in ordering the Postmaster at New York, New York to seize Plaintiff's lawful mail matter and to refuse payment of lawful money orders made payable to Plaintiff, and the statute under which the Defendants claim authority for their action; is unconstitutional, being contrary to the provisions of the First and Fifth Amendments to the Constitution of the United States, and is legislative in nature, and such unlawful action has caused, and will continue to cause Plaintiff to suffer great loss, injury and damage unless Defendants and their subordinates are restrained and enjoined, - Plaintiff having no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays:

34 1. That the judgment of this Court be entered declaring that the action of Deputy Postmaster General and the Postmaster General in issuing and causing to be issued, "Unlawful" order No. 56390 is contrary to law and is therefore null and void.

2. That the Postmaster General and his subordinates and employees as such, be restrained and enjoined both pendente lite and permanently from seizing and returning to senders, mail matter addressed to Plaintiff, from refusing to deliver such mail matter to Plaintiff, from refusing to pay postal money orders made payable to Plaintiff, and from otherwise interfering with, and depriving Plaintiff, of its right to the use of the facilities of the United States mails.

3. And for such other and further relief as to the Court may seem just and proper.

CADILLAC PUBLISHING CO., INC.

By /s/ Louis Shapiro
Vice President and Secretary
Cadillac Publishing Co., Inc.
Plaintiff

/s/ Horace J. Donnelly, Jr.
730 Fifteenth Street, N.W.
Washington 5, D.C.
National 8-5667

Attorney for Plaintiff

[Filed July 3, 1957]

EXHIBIT C

RULES OF PRACTICE IN PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT, AMENDED EFFECTIVE NOVEMBER 6, 1952

Sec. 150.404 Notice of Hearing. If the Chief Hearing Examiner shall determine that the complaint states facts sufficient to show the probable need for administrative action by the Postmaster General, he shall issue a notice of hearing to the respondent.

* * * * *

Sec. 150.422 Hearing Examiner's Decision. (a) Where the respondent, having filed answer, fails to appear at the hearing, the hearing examiner shall receive such proof as he may deem proper in support of the allegations of the complaint, and shall make and file a decision from which no appeal may be taken by the respondent to the Postmaster General, and the Postmaster General may thereafter issue the order recommended in the complaint without further notice to the respondent.

(b) The hearing examiner may render an oral initial decision at the close of the hearing if the nature of the case and the public interest so warrant. Otherwise, he may render such initial decision at a later date as hereinafter provided.

(c) After the date specified by order of the hearing examiner for the filing of proposed findings of fact, conclusions of law and supporting reasons pursuant to the provisions of Sec. 150.421 of this subpart, the hearing examiner shall make and file an initial decision which shall become the final decision unless an appeal therefrom is perfected in the manner provided in Sec. 150.423 of this subpart.

(d) The initial decision of the hearing examiner shall include (1) findings and conclusions with the reasons therefor upon all the material issues of fact, law or discretion presented on the record; and (2) an appropriate order for execution by the Postmaster General or a denial of the order requested in the complaint.

(e) A copy of the hearing examiner's initial decision shall be served upon each party who participated in the hearing.

Sec. 150.423 Appeal from Initial Decision. (a) Any party of record in a proceeding, except those who failed to answer the complaint or having answered fail to appear at the hearing, may file a notice of intention to appeal to the Postmaster General in accordance with paragraph (b) hereof.

(b) A notice of appeal must be filed within the time limit fixed by order of the hearing examiner, of which a copy shall be served upon each party who participated in the hearing. If an initial decision is rendered orally by the hearing examiner at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which notice of appeal must be filed. Such time limit shall in no case exceed 10 days from the time of the aforesaid service upon or notice to such parties.

* * * * *

(e) The brief on appeal shall be filed within the time specified therefor by the hearing examiner. Opposing brief shall be filed within the time allowed therefor by the hearing examiner. If the respondent fails to file the notice of appeal within the time specified therefor, or, having filed notice of appeal, fails to file the appeal brief within the time specified therefor, the Postmaster General may thereafter issue the order found in the hearing examiner's initial decision to be appropriate for issuance upon the basis of the record.

* * * * *

Sec. 150.424 Postmaster General's Orders. (a) Copies of the Postmaster General's decision and order shall be incorporated in the record of the proceeding. The order shall be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to put the provisions of said order into effect.

Sec. 150.425 Application for Modification or Revocation of Orders. (a) Any party against whom an order has been issued by the Postmaster General may file with the Docket Clerk an original and three copies of an application for modification or revocation thereof. Said application shall set forth the grounds upon which it is based; must contain a statement to the effect that the unlawful enterprise against which the order is directed is no longer being conducted under the name or names specified in the order or any other name and that the unlawful scheme will not be resumed in the future under such names or any other names; and it must be sworn to by the applicant.

(b) The Docket Clerk shall deliver a copy of such application to the Solicitor. The Chief Hearing Examiner shall assign the matter to a hearing examiner who shall set a date for the filing of the Solicitor's reply to such application.

(c) A copy of the Solicitor's reply to such application shall be delivered to the applicant by the Docket Clerk. Thereafter the hearing examiner may either enter an order denying such application or transmit the application, together with his recommendation that it be granted in whole or in part, to the Postmaster General for final decision and action.

* * * * *

[Filed May 21, 1954 Harry M. Hull, Clerk]

EXHIBIT "E"

RULES OF PRACTICE IN PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT, AMENDED EFFECTIVE JANAURY 20, 1954

* * * * *

Sec. 150.404 Notice of Hearing. Upon filing of the complaint the Administrative Assistant to the Deputy Postmaster General shall issue a notice of hearing. Said notice of hearing shall contain the date and place of hearing, the date upon which answer to the complaint may

be filed, the name of the hearing examiner to whom the case has been assigned and a reference to the effect of failure to file answer.

* * * * *

Sec. 150.422 Hearing Examiner's Decision. (a) Where the respondent, having filed answer, fails to appear at the hearing, the hearing examiner shall receive such proof as he may deem proper in support of the allegations of the complaint, and shall make and file a decision from which there is no appeal. The order recommended in the complaint may, in such circumstances, be issued without further notice to the respondent.

(b) The hearing examiner may render an oral initial decision at the close of the hearing if the nature of the case and the public interest so warrant. Otherwise, he may render such initial decision at a later date as hereinafter provided.

(c) After the date specified by order of the hearing examiner for the filing of proposed findings of fact, conclusions of law and supporting reasons pursuant to the provisions of Sec. 150.421 of this subpart, the hearing examiner shall make and file with the Docket Clerk an initial decision which shall become the final decision unless an appeal therefrom is perfected in the manner provided in Sec. 150.423 of this subpart.

(d) The initial decision of the hearing examiner shall include findings and conclusions with the reasons therefor upon all the material issues of fact, law or discretion presented on the record.

(e) The Docket Clerk shall cause a copy of the hearing examiners' initial decision to be mailed to each party who participated in the hearing.

Sec. 150.423 Appeal from Initial Decision. (a) Any party of record in a proceeding, except those who failed to answer the complaint or having answered fail to appear at the hearing, may file a notice of intention to appeal to the Postmaster General in accordance with paragraph (b) hereof.

(b) A notice of appeal must be filed with the Docket Clerk within 10 days from the time of mailing the initial decision to the parties. If an initial decision is rendered orally by the hearing examiner at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which notice of appeal must be filed. Such time limit shall in no case exceed 10 days from the time of the aforesaid service upon or notice to such parties.

* * * * *

(e) Upon the filing of a notice of appeal the Administrative Assistant to the Deputy Postmaster General will notify the parties when briefs and replies thereto may be filed. The time to file briefs may be extended only upon application to the Administrative Assistant to the Deputy Postmaster General who will grant or deny at the direction of the Deputy Postmaster General. If the respondent fails to file the appeal brief within the time prescribed, he will be deemed to have abandoned his appeal and the matter will proceed as though notice of appeal had not been filed.

* * * * *

Sec. 150.424 Final Orders. (a) Copies of the final decision and order shall be incorporated in the record of the proceeding. The Administrative Assistant to the Deputy Postmaster General shall cause the order to be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to put the provisions of said orders into effect.

Sec. 150.425 Application for Modification or Revocation of Orders. (a) Any party against whom an order has been issued may file with the Docket Clerk an original and three copies of an application for modification or revocation thereof. Said application shall set forth the grounds upon which it is based; must contain a statement to the effect that the unlawful enterprise against which the order is directed is no longer being conducted under the name or names specified in the order or any other name and that the unlawful scheme will not be resumed in the future under such names or any other names; and it must be sworn to by the applicant.

(b) The Administrative Assistant to the Deputy Postmaster General shall call upon the Solicitor for such written reply to the application as the Solicitor may care to file.

(c) A copy of the Solicitor's reply to such application shall be delivered to the applicant by the Docket Clerk. Thereafter an order granting or denying such application will be issued.

* * * * *

DELEGATIONS OF AUTHORITY

1. By the Postmaster General to the Deputy Postmaster General, Postmaster General Order No. 55507 dated January 13, 1954, reads as follows:

"Purusant to authority of section 1(b) of Reorganization Plan No. 3 of 1949 (63 Stat. 1066), authority is hereby delegated to the Deputy Postmaster General to execute and perform in his own name all powers, functions and duties conferred by law upon the Postmaster General, including authority to modify, suspend, or rescind orders, instructions, and regulations which have heretofore, or which may hereafter be issued in the name of the Postmaster General, except that I do hereby reserve to the Postmaster General exclusive authority to modify, suspend, or rescind all or any part of the authority delegated to the Deputy Postmaster General by this Order.

"The Deputy Postmaster General is hereby authorized to delegate to any officer, employee, or agency of the Post Office Department designated by him such of the powers, functions and duties delegated to him by this Order as he deems appropriate.

"All prior delegations made by me are to remain in full force and effect until changed by order of the Postmaster General or the Deputy Postmaster General."

Pursuant to this order the Deputy Postmaster General will exercise final authority and will issue agency decisions with respect to matters covered by the foregoing rules to the extent that such final authority is not redelegated.

2. By the Deputy Postmaster General to the Administrative Assistant to the Deputy Postmaster General. Deputy Postmaster General Order No. 55510 dated January 14, 1954, reads in part as follows:

"1. THE ADMINISTRATIVE ASSISTANT TO THE DEPUTY POSTMASTER GENERAL, is authorized to issue in his name and revoke when revocation is warranted the orders which the Postmaster General is authorized to issue by sections 255, 259, 259a and 732 of title 39, U.S. Code, in the following circumstances and conditions:

"(a) When the order to be issued involves and concerns persons residing outside the United States its Territories and Possessions and for whom an agency hearing under the Administrative Procedure Act (5 U.S.C. 1001 et seq.) is not available.

"(b) When the order to be issued involves and concerns residents in the United States its Territories and Possessions who, having been offered opportunity for agency hearing, have failed to file answer as provided by the Post Office Department Rules of Practice in Proceedings under the Administrative Procedure Act (5 U.S. Code, Sections 1001 et seq.)."

Pursuant to this order the Administrative Assistant to the Deputy Postmaster General will exercise within the limitations above set forth final authority and will issue agency decisions with respect to matters covered by the foregoing rules.

Published by direction of
the Deputy Postmaster General

* * * * *

[Filed July 3, 1957]

EXHIBIT "F" TO COMPLAINT

POST OFFICE DEPARTMENT

WCO'B:omd
Sol. Doc. 3/126

Office Of The Solicitor
Washington 25, D. C.

April 22, 1954

Mr. Horace J. Donnelly, Jr.,
Attorney at Law,
American Security Building,
Washington 5, D.C.

Re: Cadillac Publishing Co., Inc.
H. E. Docket No. 2/16.

Dear Mr. Donnelly:

This will acknowledge receipt of copy of your letter of March 30, 1954 to the Administrative Assistant to the Deputy Postmaster General with respect to the above entitled proceeding. This office has no objection to the granting of your request for a short further extension of time within which to file your reply to the Solicitor's appeal.

Consideration has been given to the proposals contained in your letter of March 8, 1954. It is not believed that they constitute a satisfactory basis for the disposition of this case. However, I am enclosing herewith a form of affidavit by way of compromise whereby your client will undertake to restrict the sale of "The Illustrated Encyclopedia of Sex" to certain persons and under certain conditions set forth in the affidavit.

If this affidavit is filed within ten days recommendation will be forwarded to the Administrative Assistant to the Deputy Postmaster General to suspend further proceedings in this case.

Sincerely yours,

/s/ Abe McGregor Goff
Solicitor.

Enclosure.

ANSWER

[Filed Aug. 30, 1957]

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

Answering the numbered paragraphs of the complaint, the defendants aver:

1. Admitted.

2. The defendants are not required to answer the allegations contained in paragraph 2 of the complaint.

3. Denied, except that defendants admit plaintiff publishes a book entitled "The Illustrated Encyclopedia of Sex" which is advertised and sold through the United States mails.

4. Denied as set forth in paragraph 4 of the complaint.

5. Denied as set forth in paragraph 5 of the complaint, except that defendants admit that an action wherein plaintiff was charged with obtaining and attempting to obtain remittances of money through the mails by means of false and fraudulent pretenses, representations and promises, was decided adversely to the complainant therein by the hearing examiner, but aver that said proceedings were based on advertising different from the advertising forming the basis of defendants' Order No. 56390.

6. Defendants admit that on February 24, 1953 the then Acting Solicitor for the Post Office Department filed a complaint with the Chief Hearing Examiner charging plaintiff with violation of Title 39 U.S.C., Sec. 259(a) and alleging that said company was obtaining and attempting to obtain money through the mails for the "Illustrated Encyclopedia of Sex" from readers of certain indecent, obscene, lewd, and lascivious publications by placing advertisements in such publications describing the said "Illustrated Encyclopedia of Sex" erotically

and suggestively, and that after a ruling adverse to the defendants by the Hearing Examiner the Solicitor appealed from the Examiner's finding and requested reversal thereof by the Postmaster General.

7. Defendants admit that the Solicitor appealed from the Examiner's initial decision, but defendants aver that said appeal was properly filed in accordance with Departmental Rules of Procedure promulgated pursuant to the Administrative Procedure Act (5 U.S.C. 1001, et seq), and defendants further aver that the Examiner's initial decision, being no more than an advisory opinion, was appealable and could be adopted, rejected or modified by the Postmaster General or his duly authorized deputy, and it was so held by the United States Court of Appeals for the District of Columbia in case No. 12506, decided June 30, 1955, 227 F 2d 29, and that the Departmental decision was delayed by further judicial proceedings initiated by plaintiff, and defendants further aver that the basis of settlement alleged was unsatisfactory in that it would not result in purging the mails of the unlawful enterprise and was not timely made under the Departmental Rules of Procedure.

8. Defendants admit that plaintiff's counsel filed a reply to the Solicitor's brief on appeal eighteen months after having been notified of the date to do so, and that the aforesaid appeal was adjudicated by the "Final Departmental Decision of the Deputy Postmaster General on Appeal" dated June 28, 1957, and that during the time said appeal had been pending plaintiff was enabled to continue to advertise in lewd, indecent publications the "Illustrated Encyclopedia of Sex". Defendants deny that said decision was based upon any findings or conclusions contrary to law or fact but were based upon substantial evidence in the record of the Departmental proceedings.

9. Denied.

10. Denied.

11. Denied.

WHEREFORE defendants having fully answered pray judgment together with the costs of this suit.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ Robert J. Asman
Assistant United States Attorney

[CERTIFICATE OF SERVICE]

[Filed Aug. 27, 1957]

MOTION FOR INJUNCTION PENDENTE LITE

Plaintiff moves the Court to grant an injunction pendente lite against defendants restraining them and their agents and subordinates in the Post Office Department as such, from enforcing "Unlawful" order No. 56930 of the Post Office Department issued against Plaintiff In the Matter of Cadillac Publishing Company, Inc., before the Post Office Department, H. E. Docket No. 2/16, as prayed in the complaint filed in the above captioned cause, and for reasons therefore, states:

1. Following a hearing before this Court on Plaintiff's application for a temporary restraining order, Plaintiff and Defendants did agree in a stipulation filed in, and approved by this Court, on or about the 15th day of July 1957, that mail matter addressed to Plaintiff at New York, New York would be opened in the Post Office there, would be examined by a representative of Defendants and that any mail matter which is a result of, or pertains to, Plaintiff's advertisements of the book "Illustrated Encyclopedia of Sex" in magazines of the type classified by Defendants as being "sexy" would be withheld from delivery to Plaintiff pending the order of this Court, and that all other mail matter so examined shall be delivered to Plaintiff. On the basis of this agreement Plaintiff's

then pending motion for relief pendente lite was withdrawn without prejudice by agreement with counsel for Defendants.

2. In the aforesaid stipulation Plaintiff agreed to furnish representatives of the Post Office Department with a list of code words and numbers which identified the magazines as the source of each order received from members of the public for the book "Illustrated Encyclopedia of Sex", Plaintiff further agreeing that any orders not on their face identifiable as to source are to be held at the Post Office at New York, New York, and are not to be delivered to Plaintiff -- it being the sense of this latter understanding that such unidentifiable orders are to be disposed of only pursuant to the order of this Court.

3. Pursuant to said agreement Plaintiff did furnish a list containing the names of magazines in which its advertisement was appearing, together with the code numbers appearing upon the order blanks forming a part of the advertisement, which identified the particular magazine or periodical. A copy of said list is attached hereto as Exhibit A.

4. Upon examination of said list Defendants' representatives did authorize the release to Plaintiff of mail matter emanating from five magazines or periodicals appearing on said list, "New York Times", "Griers Almanac", "Greatest Moments in Sports", "American Journal of Public Health" and "Sexology", but Defendants' representatives have failed and refused to release approximately 10,000 orders emanating from advertisements in the other magazines or periodicals listed, said orders having approximate value of $30,000.00 and have arbitrarily failed and refused to make a determination as to whether or not such magazines or periodicals are "sexy" -- Defendants' representatives giving as an excuse for their inaction the claim that they do not have copies of such magazines or periodicals from which to make a determination even though as Plaintiff has pointed out to such officials in a letter, a copy of which is attached hereto as Exhibit B, that the greater part of these magazines and publications are entered in the Post Office

as second-class mail and that therefore copies of same have to be on file in the office supervising such second-class entries in the Post Office Department. Plaintiff also in said letter demanded that orders emanating from advertisements in second-class entry publications should be released to Plaintiff since the fact that such publications were entitled to this privilege negated any theory or possibility that such publications could be considered obscene or otherwise objectionable under the postal laws and regulations. This demand was rejected by Defendants' representatives as evidenced by an undated letter despatched on or about August 8, 1957 over the siganture of the Deputy General Counsel of the Post Office Department, a copy of which is attached hereto as Exhibit C.

There is now and has been since on or about July 1957 a large quantity of mail matter addressed to Plaintiff held at the Post Office at New York containing orders and remittances for Plaintiff's book "Illustrated Encyclopedia of Sex" which are being held from Plaintiff and that as a consequence of said withholding both Plaintiff and the Post Office Department are in receipt of numerous complaints from members of the public with respect to non-delivery of the merchandise ordered and the failure to return their remittances as demanded; that as a result of the failure of Plaintiff to timely fulfill such orders because of same being withheld by Defendants' representatives many of the accumulated orders have been cancelled by Plaintiff's customers and the good-will and reputation of Plaintiff is being destroyed because of both inability to meet its obligations to the public or to return remittances where either orders have been cancelled or a book has been returned for refund of the purchase price in accordance with Plaintiff's advertised policy -- there is attached hereto as Exhibit D the affidavit of the Vice-President of Plaintiff with respect to this situation.

5. It is thus apparent that Plaintiff is suffering and will continue to suffer irreparable loss, damage and injury, from which it has no complete or adequate remedy at law, and that the only relief available Plaintiff pending a final determination of the issues raised by the com-

plaint in this cause filed, is by the granting to Plaintiff of an injunction pendente lite restraining Defendants and their representatives from continuing to withhold mail matter addressed to Plaintiff and compelling such officials to make prompt delivery of all mail matter now being held at the Post Office at New York, New York, addressed to Plaintiff, it being apparent that the stipulation hereinbefore reached is not, and cannot be made, workable so long as Defendants' representatives have arbitrarily refused and failed to honor the responsibility placed upon them by the aforesaid stipulation. Further it would appear that the agreement made by Defendants' representatives is impossible of performance as a matter of law in that there is no requirement of law regulation or by judicial interpretation which would confer jurisdiction upon the Post Office Department to ban any magazine or periodical under the classification of "sexy", - there being no standard or definition either in fact or in law as to the meaning of the word and the action of the Defendant, Deputy Postmaster General in issuing his "Unlawful" order against Plaintiff was not based upon any law or any substantial evidence but was an arbitrary and capricious action on his part in accepting the views and personal opinions of his subordinates without any reasoned conclusion or proper examination of the evidence or valid interpretation of the statute which he has here invoked. Said action is therefore not the action in fact of said Defendant or the Defendant Postmaster General since neither official arrived at a reasoned conclusion from evidence, and in other respects such action has deprived Plaintiff of their right to due process of law and is thus arbitrary, unwarranted and capricious.

Wherefore the premises considered Plaintiff respectully urges that pending the final determination of the issues of law in fact presented by Plaintiff, the Court issue its writ of injunction restraining and enjoining Defendants from further interference with the delivery of mail matter addressed to Plaintiff at the Post Office at New York, New York, and from in any manner enforcing the so-called "unlawful" order issued

against Plaintiff until the further order of this Court.

And for such other and further relief as to the Court may seem just and proper.

/s/ Horace J. Donnelly, Jr.

Attorney for Plaintiff
730 Fifteenth Street, N. W.

[CERTIFICATE OF SERVICE]

EXHIBIT "A" TO MOTION FOR INJUNCTION PENDENTE LITE

E775	Griers Almanac		
E779	Police Files	E837	Police Files
E781	Bare	E838	Private Lives
E782	Laughing World	E839	Crime Police Cases
E783	Tobe Mens Group	E840	Modern Man
E784	Adventure Mens Group	E841	American Journal of Public Health
E785	Amazing & Complete Det.		
E786	Lowdown	E842	Tabs Mens Group
E787	Imagination - Imaginative Tales	E843	Adventure Mens Group
E788	Peril	E844	Scan Doll Quarterly
E789	Scan	E845	Hollywood Confidential
E790	Scan	E846	Tomcat
E791	Hit Annual	E847	Tip Off
E792	Uncensored	E848	Greatest Moment in Sports
E793	Adam	E849	Imagination
E794	My Romance	E850	Adam Annual
E795	Ogle	E851	Adam
E796	Playgirl	E852	Fawcett Detective Unit
E797	Behind the Scene	E853	Night and Day
E798	Police Dragnet	E854	Ogle
E799	Detective Case	E855	My Romance
E800	Police Files	E856	Bare
E801	Gala, Frolic, etc.	E857	Bare

E802 Cavalier
E803 Good Negro Group
E864 Peril
E805 Hit Show
E806 Picture Show Annual
E807 Man to Man Annual
E808 Timely Women Group
E809 Uncensored
E810 Scan
E811 Bare
E812 Mister Annual
E813 Laff Annual
E814 Modern Man
E815 Adam
E816 Lowdown
E817 Imagination Group
E818 Tomcat
E819 Good Negro Group
E820 Hollywood Confidential
E821 Night and Day
E822 My Romance
E823 Tabs Men's Group
E824 Cape Group
E825 Sir Annual
E826 Modern Man
E827 Behind the Scene
E828 Good Negro Group
E829 Amazing Detective & Detective cases
E830 Tomcat
E831 Lowdown
E832 Pix Annual

E858 Peril
E859 Dream Girl
E860 Night and Day
E861 Posse & Salvo
E862 Bare
E863 Ogle
E864 Fawcett Detective Group
E865 Adam
E866 Tip Off
E867 Tomcat
E868 Hollywood Confidential
E869 Playgirl
E870 Adventure Men's Group
E871 Jumbo
E872 Modern Man
E873 Modern Man
E874 Crime Police Case
E875 Private Lives
E876 Police Files
E877 Detective Cases
E878 Police Dragnet cases
E879 Exposed
E880 Exposed
E881 Hit Annual
E882 Picture Show Annual
E883 Low Down
E884 Amazing Detective & Det. Cases
E885 Good Negro Group
E886 Good Negro
E887 Behind the Scene
E888 Cape
E889 Timely Women's Group

E833 Man to Man Annual
E834 Exposed
E836 Detective Cases

E892 Fawcett Detective Unit
E893 Adam
E894 Imagination Group
E895 He
E896 Harem
E897 Quick
E898 Celebrities Answer
E899 Private Confessions
E900 Night and Day
E901 China Doll and Honey Tones
E902 Harem
E903 Quick
E904 He
E905 Uncensored
E906 Adam
E907 Lowdown
E908 Modern Man
E910 Good Negro
E911 Behind the Scenes
E912 Fawcett Detective Unit
E913 Night and Day
E914 Hit Show
E915 Tomcat
E916 Pep Annual
E917 Detective Cases
E918 Police Dragnet
E919 Police Files
E920 Uncensored & Tip Off

E890 Gala, Frolic, Follies & Glamour
E891 Quick

All "T" code numbers are from Sexology Magazine

E921 T.N.T.
E922 T.N.T.
E923 Quick
E924 He
E925 Harem
E926 Dare
E927 Adam
E928 Exotic Romance
E930 Good Negro
E931 Mister Annual
E932 Modern Man
E933 Precinct Detective Group
E934 Peril
E935 Dazzle
E936 Tomcat
E937 Playgirl
E938 Adam
E939 Tabs Men's Group
E940 The New York Times
E941 Amazing Detective
E942 Tillinger Group
E943 Laff Annual
E944 Gala & Frolic Follies Glamour
E945 Modern Man
E946 Night and Day
E947 Bargain

EXHIBIT "B" TO MOTION FOR INJUNCTION PENDENTE LITE

AUGUST 5th, 1957

Office of the General Counsel,
Post Office Department,
Washington, D.C.
Attention: Sol Mindel, Esq.

Re: Cadillac Publishing Co. v. Summerfield

Gentlemen:

I refer to our telephone conversation of July 24th with respect to operations under the stipulation entered in the above case.

It is my understanding of the position of your office that all of the orders for the book "Illustrated Encyclopedia of Sex", which result from advertising in periodicals (except the five you have heretofore released) are to be withheld from the addressee; that the mail so withheld will include, in addition to the orders resulting from advertisements in the periodicals mentioned in the final departmental decision, those which emanate from magazines you have not had the opportunity to examine, and that you wish samples from my client of all the publications shown on the key list furnished your office.

In this connection, please be advised that a substantial number of those publications enjoy Second Class mailing privileges. A list of such publications is enclosed herewith.

The fact of the granting of this privilege to such publications should in itself, be sufficient the release of mail orders emanating from my client's advertising therein, for it is my understanding that the Second Class mailing privilege is not accorded to publications determined to be obscene or which cater to the prurient.

Furthermore, it would appear that sample copies of these Second Class publications should be on file in the Classification Division of the Post Office Department and should there be available for inspection by your office, without the necessity of my client going to the expense and trouble of assembling copies thereof.

It is therefore respectfully requested that you give this matter your prompt attention and instruct the Postmaster at New York to release to my client all mail matter emanating from advertisements of the book in those magazines which have been accorded the Second Class mailing privilege. We feel that your failure to release such mail matter would be clearly in violation of the letter and spirit of the aforesaid stipulation. Having brought this phase of the matter to your attention, it is our hope that we may have your cooperation in avoiding further irreparable loss to my client.

Your early attention to this request will be appreciated.

Very truly yours,

HORACE J. DONNELLY, JR.

Encl. 1

HJD: d

P.S.: Will you be good enough to mail a copy of your reply to Jack Last, Esq., Attorney at Law, 29 Broadway, New York, 6, N.Y., who is associated with me in this matter, as I expect to be away from my office for the next week or ten days?

EXHIBIT "C" TO MOTION FOR INJUNCTION PENDENTE LITE

POST OFFICE DEPARTMENT
Bureau of the General Counsel
Washington 25, D. C.

Mr. Horace J. Donnelly, Jr.
Attorney at Law
American Security Building
Washington 5, D.C.

Re: Cadillac Publishing Co. v. Summerfield

Dear Mr. Donnelly:

This will acknowledge receipt of your letter of August 5, 1957 relating to the stipulation which was executed by you as counsel for the plaintiff in the above-entitled action and by Assistant United States

Attorney E. Riley Casey in behalf of the defendant July 15, 1957.

The stipulation provides that mail matter which is the result of, or pertains to, plaintiff's advertisements of the book "Illustrated Encyclopedia of Sex" in magazines of the type classified by defendant as "sexy" shall continue to be held at the post office at New York, New York unless and until defendants are directed to make delivery by the courts and that where the source of the order is not identifiable, it shall also be impounded with the other mail. Your letter of August 5 is not within the terms of disagreement. As you know, many magazines have obtained second-class entry which may be termed "sexy". Some of these may become so "sexy" as to become nonmailable without having had their second-class mailing privilege revoked. In fact, there is a large number of magzines in this category and some of them have been the subject of second-class entry revocation proceedings. I, therefore, cannot agree to your request that the postmaster at New York be instructed to release to your client all mail matter emanating from advertisements in magazines which have been accorded second-class mailing privileges.

In accordance with your request, I am mailing a copy of this letter to Jack Last, Esq., Attorney at Law, 29 Broadway, New York 6, New York. I will also furnish a copy to the United States Attorney in Washington, D. C.

Sincerely yours,
/s/ Leo P. Knoll
Deputy General Counsel.

AFFIDAVIT OF LOUIS SHAPIRO ACCOMPANYING MOTION FOR INJUNCTION PENDENTE LITE

I Louis Shapiro being duly sworn on oath depose and say that I am the Vice-President and Secretary of the Cadillac Publishing Company, Inc., the Plaintiff named in the caption hereof; that on or about the 15th day of July 1957 there was filed in this action a stipulation between the parties hereto in which it was stipulated and agreed that all mail matter

addressed to Plaintiff would be opened in the presence of a representative of the Post Office Department at the Post Office at New York, New York, and after examination thereof that mail matter which is a result of, or pertains to, Plaintiff's advertisements of the book "Illustrated Encyclopedia of Sex" appearing in magazines of the type classified by Defendants as being "sexy" would be held at said Post Office and not delivered to Plaintiff unless and until Defendants are so directed by order of this Court; that said stipulation agreement further provided that Plaintiff would furnish representatives of the Post Office Department with a list of code words and numbers which identify the magazines and separate issues thereof as a source of each order received from members of the public for the book "Illustrated Encyclopedia of Sex".

That a list of the magazines with identifying code numbers was duly furnished representatives of Defendants at the New York Post Office, and that mail matter identified as stemming from the advertisements in such publications, with the exception of "Griers Almanac", "American Journal of Public Health", "Greatest Moments in Sports", "The New York Times", and "Sexology" has been and is being withheld from delivery to the Plaintiff.

That the orders for Plaintiff's publication "Illustrated Encyclopedia of Sex" now held at the Post Office at New York are approximately 10,000 in number. The withholding of which has deprived Plaintiff of a substantial amount of business amounting to approximately $30,000.00, and has resulted in complaints being made to both the Post Office Department and the Plaintiff by members of the public for failure of Plaintiff to execute such orders, Plaintiff having no means of doing so, so long as said orders with payments attached are withheld from it by the Post Office Department.

That although Plaintiff has furnished the Post Office Department with the names of the publications in which it advertises said book, yet with the five exceptions noted above, the Defendants and their

representatives have failed and refused to release any other mail matter relating to Plaintiff's periodical magazine advertising.

That Plaintiff promptly upon the receiving of notice that their mail was not to be delivered to them but was to be returned to senders marked "unlawful" pursuant to Defendants' "Unlawful" order number 56390 dated June 28th, 1957, brought its action in this Court for injunctive relief and forthwith sought a temporary restraining order in order to prevent the destruction of its business during the pendency of this action; that upon a hearing on Plaintiff's motion the Defendants agreed to hold mail matter addressed to Plaintiff and not to continue to return same to senders, pending a disposition and determination of the issues presented by Plaintiff's complaint and pending a hearing on Plaintiff's motion for an injunction pendente lite; that as a result of the above referred to stipulation Plaintiff withdrew its injunction pendente lite without prejudice in the hope and in the belief that a workable arrangement would result from said stipulation, namely that Plaintiff would be allowed to receive orders and inquiries from every source but the few magazines which are named in the Department's final decision, or in the record of the proceedings namely "Frolic", "Night and Day", "Gala", and "Hit Annual", Plaintiff no longer advertising in the several other magazines named in the proceedings; that instead of making a prompt and decisive ruling as to which of the magazines on the list furnished by Plaintiff were to be classified as "sexy" by the Post Office Department, representatives of the Defendants called upon Plaintiff for sample copies of each and every magazine listed by Plaintiff with exception of the five hereinbefore referred to, the majority of which according to deponent's best information and belief are registered in the Post Office Department under the second-class mailing privilege, where copies thereof are available for inspection of officials of the Department, Defendants' representatives giving as an excuse for their failure to take decisive action the claim that before making a decision as to whether or not a specific magazine was "sexy" they would have

to see the magazine itself;

That when the fact of second-class registration was called to the attention of officials of the Post Office Department together with the fact that copies were on file in the Division of Mailing Classification, Defendants' representatives replied that many magazines have obtained second-class entry which may be termed "sexy" and some of them have been the subject of second-class revocation proceedings, and the Deputy General Counsel of the Post Office Department thereupon refused Plaintiff's request that the Postmaster at New York be instructed to release to Plaintiff all mail matter emanating from advertising in magazines which have been accorded second-class mail privileges.

Deponent is informed and believes and therefore avers that the aforesaid stipulation entered in between the parties hereto is unworkable under the attitude adopted by the Post Office Department, and as a consequence Plaintiff is suffering great loss and hardship because of its inability to receive orders from the public and to fill same and that the longer such mail matter is held from delivery to Plaintiff the greater the loss due to cancellations because of non-delivery of the merchandise ordered.

/s/ Louis Shapiro
Vice President and Secretary
Cadillac Publishing Co., Inc.

[JURAT]

[Filed 9/26/57]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants having now filed their answer to the complaint and it appearing that there is no genuine issue as to any material fact and that the filing of this motion will not delay a trial, plaintiff moves for judgment and for reasons therefore states:

1. This proceeding being in the nature of a statutory review within the meaning of Section 10(a) of the Administrative Procedure Act of 1946 (as amended Title 5 1009(a)) of the actions of defendants in issuing

or causing to be issued a so-called "unlawful" order under the alleged authority of the Act of 1950 (39 U.S.C. 259(a)) , the entire record of the proceedings in the Post Office Department are now before the court for review.

2. The action of defendants was arbitrary, capricious, and unwarranted as a matter of fact and law, from which plaintiff is entitled to injunctive relief, it being shown by the verified complaint and by affidavit attached to plaintiff's motion for an injunction pendente lite that plaintiff has suffered, and will continue to suffer, irreparable loss, damage and injury for the relief of which there is no plain, sufficient or adequate remedy of law, in that defendant Maurice Stans in issuing the order complained of had no jurisdiction as a matter of law over the plaintiff or the subject matter; that he arbitrarily disregarded the findings and decision of the Hearing Examiner, designated by statute and regulation as the trier of the facts; that he denied unto plaintiff their right to due process of law, and in other respects proceeded contrary to the provisions of the Administrative Procedure Act and that his decision (Exhibit C to the complaint) was not based upon any substantial, credible, or convincing evidence from which he could reach a reasoned conclusion against plaintiff, and that he arbitrarily, without cause or justification, reversed the department's Hearing Examiner, and in doing so misinterpreted and misapplied the statute under which the proceedings had been brought, and by committing a further errors of law.

3. That the statute as applied and the action of defendants is unconstitutional.

And for such other reasons as shall be shown on the hearing hereof.

/s/ Horace J. Donnelly, Jr.
Attorney for Plaintiff

[CERTIFICATE OF SERVICE]

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT OF THE PLEADINGS OR FOR SUMMARY JUDGMENT

* * * * *

[Filed Oct 2, 1957]

CROSS-MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney the United States Attorney and move this Honorable Court for summary judgment herein for the reason that there exists no genuine issue of material fact and defendants are entitled to judgment as a matter of law. Defendants' Exhibit No. 1, consisting of the administrative record of the Post Office Department, is attached hereto and made a part of this motion.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ E. Riley Casey
Assistant United States Attorney

[CERTIFICATE OF SERVICE]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF's MOTION FOR SUMMARY JUDGMENT

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CADILLAC PUBLISHING COMPANY, INC. Plaintiff,	
vs.	Civil Action No. 1667-57
ARTHUR E. SUMMERFIELD, ET AL., Defendants.	

Washington, D. C.
October 3, 1957.

The above-entitled action came on for hearing on cross motions for summary judgment before The Honorable ALEXANDER HOLTZOFF, United States District Judge, at 10 o'clock a. m.

APPEARANCES:

On behalf of the plaintiff:

MR. HORACE J. DONNELLY, JR.

On behalf of the defendants:

E. RILEY CASEY, Assistant United States Attorney.

---

2 PROCEEDINGS

THE DEPUTY CLERK: Cadillac Publishing Company, Inc. vs. Arthur E. Summerfield et al.

THE COURT: You may proceed.

ARGUMENT ON BEHALF OF THE PLAINTIFF IN SUPPORT OF THE MOTION

MR. DONNELLY: May it please the Court, this is an action brought by the Cadillac Publishing Company of New York against the Postmaster General and his Deputy Postmaster General involving the issuance of a so-called unlawful order banning the delivery of mail to this plaintiff.

THE COURT: What is the motion before the Court?

MR. DONNELLY: I am coming to that, sir.

The case was set down for hearing on a motion for an injunction pendente lite. That could not be heard by Judge Letts when it was called,

because of time.

In order to dispose of the case at this level the plaintiff then filed a motion for summary judgment, with the consent of the defendants' representative, the Assistant United States Attorney, who has very graciously waived his ten days' notice, has filed his cross motion for summary judgment, and that is the posture of the case at this moment.

THE COURT: In other words, the matter comes before the Court on cross motions for summary judgment rather than on the motion for injunction.

3 MR. DONNELLY: Exactly.

THE COURT: So that the decision on these motions will dispose of the controversy one way or the other.

MR. DONNELLY: Exactly.

THE COURT: Very well.

MR. DONNELLY: There is another preliminary matter. A subpoena was issued for the appearance of the Deputy Postmaster General to appear and give evidence in this case. Upon the filing of the defendants' cross motion they also tendered the entire record.

THE COURT: Of course the Court cannot hear evidence on a motion for summary judgment because if it did that that would establish the fact that there was a material issue of fact.

MR. DONNELLY: It is a question of record.

This is in the nature of a statutory review under the Administrative Procedure Act. They have tendered the record, so we have the record before the Court, so we do not need Mr. Stans and we withdraw the subpoena that was issued to him.

THE COURT: Very well.

MR. DONNELLY: I will give you briefly, in a few words, what has transpired in this case.

In 1952 this same plaintiff was charged with fraud by the Post Office Department. A hearing was held before a Hearing Examiner, re-

4 sulting in a finding in favor of the respondent, dismissing the Solicitor's complaint. That charge was based upon a violation of

Section 259, Title 39 U.S.C.

THE COURT: Numbers do not mean anything to me.

MR. DONNELLY: That is the so-called fraud statute.

THE COURT: Very well.

MR. DONNELLY: That did end up in the denial of a fraud order.

In that case was involved a book called "Illustrated Encyclopedia of Sex" published by this plaintiff and distributed through the United States mails. In that case it was charged that this book was not obscene--

THE COURT: Tell me what is involved here. Is it obscenity, or fraud, or what?

MR. DONNELLY: This is under the new obscenity statute passed in 1950.

THE COURT: What is the number?

MR. DONNELLY: 39 U.S.C. 259 (a).

In that first case the decision was in favor of the same plaintiff on the same book, namely, that the book was not obscene and that plaintiff was not offering an obscene book; it was furnishing a non-obscene book which was the charge of fraud. In other words, plaintiff was accused of advertising an obscene book and furnishing a non-obscene book.

THE COURT: I always like to clarify the issue before an argument proceeds.

Is the charge in this case that you distributed an obscene book, or that you distributed fraudulent matter in that you represented that you were going to send a person an obscene book and you sent them one that was not obscene? Which is the issue before me?

MR. DONNELLY: The issue here is that plaintiff was obtaining remittances through the mails for an obscene matter, thing, or device, namely, a book entitled "The Illustrated Encyclopedia of Sex." The fraud case was disposed of in favor--

THE COURT: No; before we come to the other case I want to know what the issue before me is in this case.

MR. DONNELLY: That is exactly it; that the plaintiff was charged before a Hearing Examiner of the Post Office Department with violation

of Section 259(a), which I have just cited to you, in that plaintiff was obtaining or seeking to obtain remittances through the United States mails for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance.

That case went to trial before another Hearing Examiner in the Post Office Department and resulted in a finding in favor of this plaintiff a second time and dismissing the second complaint.

THE COURT: But, Mr. Donnelly, I want to know what the present finding is that I am going to review.

MR. DONNELLY: The present finding is a departmental decision issued by the defendant, the Deputy Postmaster General, over his signature, reversing the Hearing Examiner.

THE COURT: Tell me what the final order is that is before me for review.

MR. DONNELLY: I am at a loss for words to tell you just exactly what was going on in his mind, Your Honor. His decision says this:

That plaintiff is advertising in magazines and periodicals which are sexy. That, therefore, plaintiff is obtaining remittances through the mails and also is furnishing information, is depositing in the mails information as to where to obtain one of the dirty, filthy, lewd, lascivious, indecent matters, things, or devices.

Do I make myself clear?

THE COURT: Well, you may proceed.

MR. DONNELLY: I think I can put it this way: If Your Honor can find the answer to the question as to why the prosecutor before the Hearing Examiner did not see fit to offer this book in evidence I think Your Honor will have the answer to this case. The Hearing Examiner did not have any book before him, so he could make no finding that the publication was obscene. The Solicitor's representative would not put it in evidence even though he had it before him and it was available to him at all times. It has been accepted for mailing for a period of seven years--six years to be exact--by the Post Office in New York. If it was obscene they could have stopped it at its source of deposit under Section

1461, Title 18.

Our position here is this, Your Honor. I am not going to read any quotations from any of the authorities. The law is well established in this jurisdiction by the Sunshine Book vs. Summerfield case--both cases--the one in 221 F. 2d and the one which is still in the Court of Appeals, but in which the decision was entered on May 21, 1956, all cited in my memorandum, and in the case of Tourlanes Publishing Company vs. Summerfield, 231 F. 2d; Oakley vs. Summerfield, 231 F. 2d;

THE COURT: What was decided?

MR. DONNELLY: The Court of Appeals says (1) the law of prior restraint of publication obtains in this jurisdiction, that is, you cannot restrain through the censorship method the future publication of a periodical.

THE COURT: There is no doubt about that, but this is not the restraint of a publication. This is the prohibition against the use of the mails.

MR. DONNELLY: But, sir, it restrains the receipt of orders from advertising in the future publications of the magazines in which this book advertises and which, out of a large group, the defendants have selected several.

THE COURT: I want to clarify my own thinking. Is there any restriction against this magazine being published, or the restraint against this magazine being mailed?

MR. DONNELLY: The restriction is against this plaintiff receiving orders originating from advertisements in a series of magazines which the defendant says are sexy and that then bans the receipt of mail from advertisements in the New York Times and several others which they have very graciously stipulated to release.

THE COURT: We will take our mid-morning recess at this time and continue this argument after the recess.

(Following brief recess:)

THE COURT: You may proceed, Mr. Donnelly.

MR. DONNELLY: I think I can get my point over better if I told

Your Honor--

THE COURT: Proceed in your own way.

MR. DONNELLY: Thank you, sir.

The crux of this matter is that the Post Office Department objects to this plaintiff advertising a non-obscene sex book, a scientific publication offered by three medical experts, they object to them advertising that type of publication in a so-called sexy magazine, that is, one which as far as I can gather, because I know of no standards for determining what is sexy and what is not, but so far as they are concerned they say any magazine that has pictures of women and has spicy text is a sexy magazine.

THE COURT: Well, I think what is a sexy magazine is more or less a question of fact. "Sexy", of course, is not a word of art. I suppose what is meant is lewd and obscene.

MR. DONNELLY: If we could dispose of the case on that definition I would be very happy. They will not call this magazine obscene; they will not call this book obscene--

THE COURT: I will see what the definition is when Mr. Casey's turn comes.

MR. DONNELLY: That is the Departmental decision signed by the defendant Deputy Postmaster General in reversing the defendants' Hearing Examiner.

THE COURT: Specifically what is the order of the Postmaster General?

MR. DONNELLY: They may receive no mail except such incidental mail as bears a Government frank from Senators and Congressmen, or from lawyers perhaps, but they cannot receive any mail, any mail at all addressed to the Cadillac Publishing Company.

This is a large publishing firm which has been in business many years in New York and publishes other publications than this one, which brings us clearly with the Sunshine Book case.

THE COURT: What does the Sunshine Book case hold?

MR. DONNELLY: It holds that the Postmaster General may not

ban lawful material.

THE COURT: What is the citation?

MR. DONNELLY: 221 F. 2d, Your Honor.

THE COURT: Which is the one you rely on?

MR. DONNELLY: The Sunshine Book Company vs. Summerfield, 221 F. 2d 45, particularly page 48.

The second Sunshine Book case--

THE COURT: But which is your one best case?

MR. DONNELLY: All four of them.

THE COURT: Give me your one best case.

MR. DONNELLY: Sunshine Book Company vs. Summerfield, 221 F. 2d 45.

THE COURT: I can't stop to read four books while you are arguing but I can stop to read one.

You know, one case on all fours is better than a dozen cases that skirt around it.

MR. DONNELLY: That was followed by the Court of Appeals--

THE COURT: In this circuit?

MR. DONNELLY: Yes, sir.

THE COURT: I don't recognize it by name.

MR. DONNELLY: I should have given you the Appeals D.C. citation.

THE COURT: Yes, you should have. That would have been helpful.

11 MR. DONNELLY: They sustain that position also in Tourlanes Publishing Company in this circuit in 231 F. 2d, and Oakley vs. Summerfield, 231 F. 2d.

THE COURT: Again I want to ask you a question because I am a bit perplexed. Those cases you cite for the proposition that the Postmaster General may not exclude from the mails future issues of a publication because in the past it has been obscene.

MR. DONNELLY: That is correct.

THE COURT: But that is not what is involved here, is it? Here you have an order stopping the receipt of mail by the plaintiff.

MR. DONNELLY: Receipt of mail and the cashing of money orders.

THE COURT: How does the doctrine of the Sunshine Book Company case apply here?

MR. DONNELLY: Because you cannot keep all of a man's mail away from him just because one factor may be found to be unlawful by the defendant.

That was followed in the Tourlanes Publishing Company case which is four-square with Your Honor's point just at the moment.

In Tourlanes they had girly pictures which the defendant found was obscene, and they also published a tax guide which could not have been

12 obscene.

THE COURT: What is the citation?

MR. DONNELLY: 231 F. 2d.

THE COURT: Is that also a District of Columbia case?

MR. DONNELLY: Yes, sir.

THE COURT: What page?

MR. DONNELLY: Page 773, and followed by Oakley, page 775.

THE COURT: Thank you, you may proceed, Mr. Donnelly.

MR. DONNELLY: This plaintiff cannot receive any mail under the ban of this order even though the advertisement appears in the New York Times, except by the present agreement with the defendants, a temporary stipulation pending, the outcome of this case.

The second point is, if Your Honor please, where the Sunshine Book Company case again comes into play, and as followed by the Court of Appeals in the second Sunshine Book case, which is not reported as far as I can find, but which was handed down on May 31, 1956, and that deals with the factor of prior restraint, which is the law of the land as pronounced in Near vs. Minnesota, by the Supreme Court, and only recently reiterated and approved by the Supreme Court in Kingsley Books vs. Brown--

THE COURT: Well, what is the doctrine?

13 MR. DONNELLY: The doctrine is that you cannot under the guise of censorship, which the Supreme Court called it in the Minnesota case,

ban future publications, future issues, because of something you have found to exist today. And that applies to us here, because here is a publication that came out long after this order was banned and in which an advertisement of the book appears.

THE COURT: What is the magazine in which it appears, the one you are showing?

MR. DONNELLY: This is a railroad man's magazine; this is called "Railroad," and the orders from this magazine are banned.

What I am trying to say to Your Honor is this. This action is really directed to a type of magazine, and directly affects an advertiser in the magazine who has nothing to do with the contents of the magazine. The only thing he is responsible for is the contents of his own advertisement, and he does not deposit anything in the mails.

I would call Your Honor's attention to the fact that the exhibits which the Government is putting in this case, the magazines, are entered in the Post Office as second-class material. If they were obscene magazines they would not be entitled to the second-class, cheaper mailing privilege.

That is, of course, collateral, but we have to suffer for what officials in the Post Office Department think is wrong, that is, our adver-

14 tising a book on sex in a magazine which they say is sexy; it panders to the prurient, whoever they may be. There has been no finding of obscenity anywhere in this case either as to these books or to these magazines. It is a brand-new doctrine.

Mr. Casey for the Government has very earnestly attempted to narrow the issues down in this case, and I appreciate his effort, by relying on a Southern District of New York case called Klaw vs. Schaffer.

THE COURT: What is the citation of that case?

MR. CASEY: I believe it is unreported, Your Honor. I have attached a copy of the memorandum opinion.

MR. DONNELLY: I have it here; it is reported. It is in 151 Fed. Supp.

THE COURT: You may proceed.

MR. DONNELLY: In that case the court declined to follow the doctrine of the Court of Appeals in this case with respect to splitting up lawful from unlawful mail on the basis of Public Clearing House vs. Coyne, 194 U.S. 510.

I respectfully call your attention to the fact that Mr. Justice Harlan in his dissent in the recent Roth case in the Supreme Court of the United States says this about Public Clearing House vs. Coyne:

"The hoary dogma of ex parte Jackson and in Public Clearing House vs. Coyne, 194 U.S. 497, that the use of the mails is a
15 privilege on which the Government may impose such conditions as it chooses, has long since evaporated."

I think that comment disposes of Judge Edelstein's opinion on which the Government so valiantly relies in the Klaw case.

THE COURT: You rely on the Sunshine Book case in this circuit, and if a decision of this circuit governs this case naturally this Court follows it. The question is whether the Sunshine case governs this case. If there is any inconsistency between the Klaw case and the Sunshine case of course the Court will follow the Sunshine case because it is binding on this Court, so the real issue is whether the present case is governed by the Sunshine case.

MR. DONNELLY: That is on one facet of the case, Your Honor.

THE COURT: Yes, I understand.

MR. DONNELLY: I am pointing out to Your Honor that our basic issue here is that how could anybody say there is a violation of this obscenity statute when the Hearing Examiner before whom the case was tried--

THE COURT: You have made that point.

MR. DONNELLY: Yes, Your Honor, I made that point; there is no book in evidence to be called obscene or non-obscene.

The second phase of our case is the procedural one, namely, this order was issued and this decision made by a deputy, whereas the statute
16 says upon evidence satisfactory to the Postmaster General. I say that he cannot delegate his quasi-judicial authority.

THE COURT: Oh, I won't waste any time on that point. The head of an executive department has the right to delegate his authority. It would be inconceivable to require the Postmaster General, or the Secretary of Agriculture, to make personal determinations of administrative quasi matters that come before them. The Morgan case years ago held that the head of an administrative agency may delegate his authority. You know that is the difference between the administrative process and the judicial process: A judge may not delegate his authority, but an administrative officer may.

MR. DONNELLY: Well, I have cases cited in my memorandum and I won't press it. The statute says he can't unless Congress gives him permission to do so. The statute says upon evidence satisfactory to him.

The Morgan case, if Your Honor please, didn't say he could delegate his decision to a subordinate. It said he could delegate the taking of evidence, but he who decides must either hear or read--he who decides, not a man on the same level, we would say, as the prosecutor.

THE COURT: There are a great many provisions, in the immigration statute particularly, providing that certain matters must be decided by the Attorney General. Now I am inclined to the view, from my own
17 past experience, that the Attorney General does not decide those matters personally; they never come to his personal attention. They are delegated to a subordinate such as the Commissioner of Immigration, or Board of Immigration Appeals. That is recognized procedure in our executive departments. I am not going to set this order aside on that ground.

MR. DONNELLY: No, I didn't ask you to do that. I asked you to take that into consideration in the complexity of this decision to know how this was arrived at. They had to do it this way in order to get this decision.

In the second place, we were tried under a set of rules that were published in the Federal Register. Those rules, I contend, did not give the prosecuting official a right to appeal to anyone from a decision against

MR. DONNELLY: In that case the court declined to follow the doctrine of the Court of Appeals in this case with respect to splitting up lawful from unlawful mail on the basis of Public Clearing House vs. Coyne, 194 U.S. 510.

I respectfully call your attention to the fact that Mr. Justice Harlan in his dissent in the recent Roth case in the Supreme Court of the United States says this about Public Clearing House vs. Coyne:

"The hoary dogma of ex parte Jackson and in Public Clearing House vs. Coyne, 194 U.S. 497, that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated."

I think that comment disposes of Judge Edelstein's opinion on which the Government so valiantly relies in the Klaw case.

THE COURT: You rely on the Sunshine Book case in this circuit, and if a decision of this circuit governs this case naturally this Court follows it. The question is whether the Sunshine case governs this case. If there is any inconsistency between the Klaw case and the Sunshine case of course the Court will follow the Sunshine case because it is binding on this Court, so the real issue is whether the present case is governed by the Sunshine case.

MR. DONNELLY: That is on one facet of the case, Your Honor.

THE COURT: Yes, I understand.

MR. DONNELLY: I am pointing out to Your Honor that our basic issue here is that how could anybody say there is a violation of this obscenity statute when the Hearing Examiner before whom the case was tried--

THE COURT: You have made that point.

MR. DONNELLY: Yes, Your Honor, I made that point; there is no book in evidence to be called obscene or non-obscene.

The second phase of our case is the procedural one, namely, this order was issued and this decision made by a deputy, whereas the statute says upon evidence satisfactory to the Postmaster General. I say that he cannot delegate his quasi-judicial authority.

THE COURT: Oh, I won't waste any time on that point. The head of an executive department has the right to delegate his authority. It would be inconceivable to require the Postmaster General, or the Secretary of Agriculture, to make personal determinations of administrative quasi matters that come before them. The Morgan case years ago held that the head of an administrative agency may delegate his authority. You know that is the difference between the administrative process and the judicial process: A judge may not delegate his authority, but an administrative officer may.

MR. DONNELLY: Well, I have cases cited in my memorandum and I won't press it. The statute says he can't unless Congress gives him permission to do so. The statute says upon evidence satisfactory to him.

The Morgan case, if Your Honor please, didn't say he could delegate his decision to a subordinate. It said he could delegate the taking of evidence, but he who decides must either hear or read--he who decides, not a man on the same level, we would say, as the prosecutor.

THE COURT: There are a great many provisions, in the immigration statute particularly, providing that certain matters must be decided by the Attorney General. Now I am inclined to the view, from my own
17 past experience, that the Attorney General does not decide those matters personally; they never come to his personal attention. They are delegated to a subordinate such as the Commissioner of Immigration, or Board of Immigration Appeals. That is recognized procedure in our executive departments. I am not going to set this order aside on that ground.

MR. DONNELLY: No, I didn't ask you to do that. I asked you to take that into consideration in the complexity of this decision to know how this was arrived at. They had to do it this way in order to get this decision.

In the second place, we were tried under a set of rules that were published in the Federal Register. Those rules, I contend, did not give the prosecuting official a right to appeal to anyone from a decision against

him on the Hearing Examiner level. The tryer of the facts was given complete jurisdiction.

THE COURT: A Hearing Examiner is not a tryer of the facts at all. He is a person who takes testimony and makes a report, like a Special Master. He is not a judge.

MR. DONNELLY: But in Minneapolis Honeywell Company vs. Federal Trade Commission, 191 F. 2d 786, it was held that the decision of the Hearing Examiner is entitled to great weight on judicial review.

THE COURT: Oh, it is entitled to great weight, yes, but I am not
18 impressed with the point that an appeal may not be taken by Government counsel to the head of the department.

MR. DONNELLY: Suppose the rules did not provide for such an appeal, and that is what I contend, the rules under which we were tried do not provide for such an appeal; that is, the decision was final.

THE COURT: You know, I never like to decide any case for or against anybody on petty technicalities. I like to decide cases on the merits and if more cases were decided on the merits and less on technicalities, I think we would make considerable progress in the administration of justice.

I am going to decide this case on the merits. I don't know whether I will decide it for you or against you, but I will not decide it on technicalities.

MR. DONNELLY: I merely raise this point because the Court of Appeals in this case originally indicated interest in the subject, but they held against us on the ground that we had not exhausted our administrative remedy. They expressed an interest in these points, and I want to retain that interest, if Your Honor please.

The only thing else that I can say, outside of the points and authorities cited in my memorandum which are, I think, rather exhaustive, if I may say so, we are faced with the loss of a tremendous amount of business by the fact that technically no mail from the public can be delivered to this plaintiff.

19 THE COURT: Now, what else do you publish? What do you publish

that is concededly in the legitimate field?

MR. DONNELLY: The transcript of the record is here, if Your Honor please.

THE COURT: Well, suppose you tell me.

MR. DONNELLY: Well, the record shows that the evidence before the Hearing Examiner showed that the plaintiff published a book called "Physics Made Simple." It published a book "Arithmetic Made Simple."

But if they only published this one book we have the dividing line, because under the theory of the Government's case they are entitled to mail from the New York Times or from decent, or whatever you want to call them, publications, but they are not entitled to receive mail that originates from advertisements in a sexy publication.

THE COURT: Well, I don't understand how one can determine what is in an envelope containing mail matter without opening the mail.

MR. DONNELLY: I don't know, sir; that's a problem for the Post Office Department, and that is what the Sunshine Book Company case says.

THE COURT: What does the order of the Post Office enjoin or restrain? Does it stop all mail?

MR. DONNELLY: Yes, sir.

20 THE COURT: I thought you said it stopped all mail.

MR. DONNELLY: Yes, sir. Here is what it says.

THE COURT: I am not interested in this stipulation, because that is a temporary matter, because what I am reviewing here is the original order of the Post Office Department. What does that enjoin or restrain?

MR. DONNELLY: It is attached as Exhibit A to the complaint, and it has been put in this case by the--

THE COURT: Yes, but what does it restrain?

MR. DONNELLY: It says to the Postmaster at New York, You shall not deliver any mail addressed to Cadillac Publishing Company, 220 Fifth Avenue, New York City, and you shall return all mail to the sender thereof stamped "Unlawful" except in such minor categories as franked mail from Congressmen or Senators or I think possibly from lawyers.

THE COURT: I think that answers my question adequately, Mr. Donnelly.

MR. DONNELLY: And furthermore, directing all postmasters throughout the United States not to honor or cash any money orders made payable to this plaintiff.

That is the posture of the case as propounded by the order. You are not interested in what we are doing now. We are opening the mail so that they can see it and we are getting some of the mail, but the determination has not been made by the defendant as to whether 150 magazines in which this plaintiff advertises are sexy are not, and I don't know who
21 is going to determine that.

THE COURT: I get your point, unless you have some additional point.

MR. DONNELLY: Thank you.

THE COURT: Now, Mr. Casey.

ARGUMENT ON BEHALF OF THE DEFENDANT

MR. CASEY: May it please the Court, the Government cross moves for summary judgment in this matter, and contends that the order issued by the Postmaster General is a valid order under the statute.

The crux of this case is that the order, as Mr. Donnelly summarized a moment ago, prohibits the receipt of postal money orders and the receipt of mail by the plaintiff under this order except letters or mail matter which can be identified on the face of the envelope or wrapper thereof as not being relative to this enterprise, such as letters from public utilities, Federal, State or municipal agencies, doctors, lawyers, churches, or magazines and newspapers. So they were prohibited from receiving any mail connected with this enterprise.

THE COURT: Before you proceed I want to see where the order is. It is not annexed to the complaint, as Mr. Donnelly said.

22 MR. CASEY: Your Honor, I have submitted the entire administrative file as an exhibit.

THE COURT: You are submitting that for use on this motion?

MR. CASEY: Yes, Your Honor. I have attached it to my motion. It is tabbed on the front there as the order; it is the second tab down, Your Honor, "Unlawful Order."

THE COURT: You may proceed.

MR. CASEY: This order was issued pursuant to a final decision that was rendered by the Deputy Postmaster General pursuant to his authorized delegation, and he found that:

> "An examination of the entire records leads to the conclusion that respondent is obtaining remittances of money through the mails for a book entitled 'The Illustrated Encyclopedia of Sex' which is found to be obscene from the advertisements; that respondent is giving information through the mails as to where, how, and from whom obscene material may be obtained; that there is evidence satisfactory to the Postmaster General to issue an 'Unlawful' Order against respondent's mail."

On that finding the order was issued.

THE COURT: And what is the order?

MR. CASEY: The order is that no mail shall be delivered to the
23 plaintiff that is connected with this enterprise.

THE COURT: How can one determine whether mail is connected with this enterprise unless the mail is first opened?

MR. CASEY: They cannot, Your Honor, and under the Supreme Court decision in the Coyne case, he who chooses to deal in this matter suffers the consequence of having all of his mail stopped.

THE COURT: You mean, for example, that this plaintiff may not receive an order for a copy of his book on physics, or on arithmetic? Mr. Donnelly stated that they published textbooks on physics and arithmetic. That doesn't seem reasonable, Mr. Casey.

MR. CASEY: The Supreme Court found that it was, sir, in the Coyne case, and reaffirmed their decision in the Read Magazine case.

THE COURT: Yes, I am familiar with the Read Magazine case because it was before me. In the Read Magazine case there was no evidence that the concern was engaged in any other enterprise except

the particular enterprise that was held to be fraudulent. That was a fraudulent enterprise. Of course, that was not under the obscenity statute.

Is this under the fraud statute or under the obscenity statute?

24 MR. CASEY: Under the obscenity statute, sir.

And following Your Honor's suggestion that if you have one case on all fours, rely on that, I choose to do that, and I have appended to my points and authorities the slip opinion of Judge Edelstein in the case of Klaw vs. Schaffer. Mr. Donnelly has given you the Federal Supplement citation to that.

Judge Edelstein has gone to great pains in a 15-page opinion in which he has detailed the history of this statute and the history of the cases determining this concept of obscenity.

He had the similar situation before him of a matter being obscene from the advertisements and the advertiser telling people where, how, and from whom he could obtain obscene material.

THE COURT: I want to clarify my own thinking. What is objectionable here? Is it claimed that the advertisement is obscene, or is it claimed that the advertisement tells people where they may obtain obscene material? Which is it?

MR. CASEY: The latter, Your Honor; the advertisement tells people where they may obtain obscene material.

THE COURT: Then Mr. Donnelly contends that actually the Postmaster General did not hold that the material itself was obscene.

25 MR. CASEY: Precisely, Your Honor, and we do not contend that the book is obscene.

THE COURT: If that is so then what you are really charging the plaintiff with is defrauding the public, namely, that they are advertising obscene material and actually selling material that is not obscene.

MR. CASEY: In effect it is that, Your Honor.

THE COURT: Well, shouldn't that be under the mail fraud statute instead of under the obscenity statute?

MR. CASEY: I do not believe so, sir, because the new statute

was passed to cover that situation. We have a case on that point, the Hornick case which is relied on by Judge Edelstein in his opinion, decided in 229 F. 2d 121. I have the case right here, Your Honor.

THE COURT: I see. In other words the Postmaster General ruled that it is a violation of the statute to advertise obscene material even though in response to the advertising the material actually furnished is not obscene.

MR. CASEY: Precisely.

THE COURT: I should have thought off-hand that would have been under the fraud statute, a fraud on the public, but the statute does prohibit the advertising of obscene material.

MR. CASEY: And I think, as the case pointed out in the Hornick case, it wouldn't make any difference if they got a Currier & Ives print,

26 or a Christmas card, if the ad led people to believe it was obscene the advertisement was obscene and therefore subject to this portion of the statute.

THE COURT: You know I am reminded of the old case--I don't think it is in the Law Reports but it was an actual case--before the Post Office Department many years ago where somebody advertised a beautifully engraved portrait of George Washington for $1, and in response to the dollar he would send a two-cent postage stamp, and that was held to be a fraud.

MR. CASEY: I would be inclined to agree that it was a fraud for a dollar.

THE COURT: Although a two-cent stamp does contain an excellent portrait of George Washington.

MR. CASEY: Yes, an excellent portrait, and I am sure it cost more than a dollar to make that portrait.

THE COURT: Well, proceed, Mr. Casey.

MR. CASEY: It is the Government's contention, Your Honor, that under the ruling in the Hornick case--and I might point out that the Deputy Postmaster General reversed the initial decision of the Hearing Examiner--the Hornick case had come out in the interim between the Hearing officer's

initial decision and the final decision by the Postmaster. The plaintiff had delayed this suit by two years, but after the initial decision and the

27 Solicitor of the Post Office Department filed his motion on appeal to the Postmaster General, the plaintiff filed a declaratory suit in this court seeking to prevent that appeal here. Judge Youngdahl dismissed it. It went up to the Court of Appeals and the Court of Appeals affirmed Judge Youngdahl, and certiorari was denied. That took approximately two years.

Then the plaintiff came back to the Post Office and filed his brief in opposition to the original brief that had been filed by the Solicitor to the Postmaster General, and that is the reason for the long delay in this case.

THE COURT: The statute says:

> "Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained"--

but according to your contention the information is false, so it is not information at all.

28 MR. CASEY: Well, it is information as to where they can obtain something which the advertisement purports to be obscene.

THE COURT: But actually it is misinformation, isn't it?

MR. CASEY: Yes, Your Honor.

THE COURT: Very well.

MR. CASEY: The similar decision I say was before Judge Edelstein, and he had this situation and relied upon the Hornick case to support this proposition that the advertising itself was sufficient to come within Section 259(a) of the statute.

The entire record that was made before the Post Office is before

the Court. I have submitted it as a certified exhibit.

I have also the actual magazines that were in evidence before the Hearing Examiner and before the Postmaster on the final decision. These contain the advertisement and they are readily seen, and I would like to pass them up.

THE COURT: Yes, I would like to see that advertisement to see whether there is basis for the holding.

MR. CASEY: If the advertisement is read in light of the pictures next to it, and the type of magazine, and the actual description of the advertisement with the description and how it describes the various chapters of the book--

THE COURT: Of course the location of the advertisement is immaterial; it is what the advertisement consists of.

29

MR. CASEY: I submit, your Honor, the placement of the ad in the type of magazine is material under the--

THE COURT: I don't see that it makes any difference whether an advertisement is in the New York Times or in a seamy publication. The question is whether the advertisement is a lawful advertisement or not.

MR. CASEY: I think, Your Honor, the advertisement has to be read in the light of its surroundings, and when the plaintiff chooses to place the ad in this type of magazine, he suffers the consequence, as our Court of Appeals said in Farley vs. Simmons, which is reported in 99 F. 2d 343:

> "The appellee was therefore bound by the consequences of his choice of magazines whether or not he had knowledge in advance of publication of the content. It is clear to be inferred that one in the operation of a business knows the nature of the contents of an advertising medium chosen by him."

In this same case the Court of Appeals chose to describe those magazines as sexy advertisements.

THE COURT: That is not a word of art, is it?

MR. CASEY: No, Your Honor; it is just a descriptive term.

THE COURT: Well, I would say that so far as the advertisement

30 is concerned that it is not arbitrary or capricious for the Postmaster General to hold that this is an offering to the public of an obscene book. The real question then in the case is whether the statute applies to such a situation if the book that is sent to those who answer the advertisement is not in fact obscene. Isn't that the real issue in this case?

MR. CASEY: I believe it is, Your Honor, as to placing an ad in there as to where, how, and from whom an obscene thing can be obtained.

THE COURT: And in response not furnishing an obscene thing.

MR. CASEY: I don't even think they have to reach the second phase even though it were in fact obscene.

THE COURT: But suppose the plaintiff defends by showing the book and saying it is not an obscene book?

MR. CASEY: I think he falls squarely within the language of the Hornick case in which the Court says it doesn't make any difference if he gets a Currier & Ives print, if he holds it out to be obscene he falls within the portion of this statute.

THE COURT: What do you say about the Sunshine case?

MR. CASEY: I say the Sunshine case is not applicable, nor does Judge Edelstein differ from it. He cites it and he agrees with the conclu-

31 sion of the Sunshine case but says that is not the situation in this type of instance.

The Sunshine case concerned future publications of a magazine. It was found that the present publication was obscene. The Postmaster General then issued an Unlawful Order concerning that magazine and all future publications. The Court held that that was a prior restraint and was not valid.

I might also point out, Your Honor, in the history of the Sunshine case that case was subsequently re-argued before the Court of Appeals in September of 1956 before all judges en banc--a year ago, over a year ago, Your Honor, and the Court has yet to render a decision.

THE COURT: Are you sure?

MR. CASEY: I am quite sure, Your Honor.

THE COURT: I don't like to contradict you, but it can't be so

because--I had before me a report of the Director of the Administrative Office of the Courts which lists the number of cases the various courts have had under advisement more than six months, or more than a year, and so on, and there were no cases listed for the District of Columbia Court of Appeals held under advisement more than six months.

MR. CASEY: You see there had been an opinion issued and published, and then there was a rehearing en banc.

THE COURT: That was of May 1st or April 1st. You say the

32 case was argued a year ago?

MR. CASEY: Yes, Your Honor. I sat in on the argu- myself personally, in September of 1956.

THE COURT: And they have not yet decided it?

MR. CASEY: No, Your Honor.

THE COURT: And that was in September?

MR. CASEY: Yes, Your Honor, in September, 1956.

THE COURT: Well, I can't take cognizance of it; I am not going to wait for them.

MR. CASEY: But I point that out to Your Honor that they have even had that much doubt of their own opinion.

THE COURT: Oh, that does not prove that they have doubt as to their own opinion. They may have other work; they may be occupied by other things. Maybe somebody wrote a majority opinion and they are waiting for the dissenting judge to write a dissenting opinion. In other words, delay proves nothing.

MR. CASEY: But I simply want to point out that we do not contend that we are flying in the face of Sunshine any more than the Klaw case is. The Sunshine case is distinguishable from this case because of future publication. We are not banning anybody from future publication.

THE COURT: But you are preventing the receipt of mail by this plaintiff, all kinds of mail, in perpetuity? Or for how long?

33 MR. CASEY: As long as this enterprise continues.

THE COURT: Well, "enterprise" is a pretty broad term. As long as they continue publishing this advertising?

MR. CASEY: Yes, Your Honor.

THE COURT: Does the order contain that limitation--I mean the order of the Post Office Department?

MR. CASEY: No, Your Honor. It just says that:

> "You are hereby instructed to return all letters, whether registered or not, and all other mail matter which shall arrive at your office directed to the said name or addresses (except letters or mail matter which can be identified on the face of the envelope or wrapper thereof as not being relative to this enterprise, such as letters from public utilities, Federal, State or municipal agencies, doctors, lawyers, churches, or magazines and newspapers) to the Postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Unlawful' plainly written or stamped upon the outside of such letters or other mail matter."

THE COURT: There is no limitation on that.

MR. CASEY: No, Your Honor.

THE COURT: Why shouldn't the order be limited to the period and a reasonable time thereafter while these advertisements are being published? Suppose for example, they stop publishing these advertisements, then what? The order still stands?

34

MR. CASEY: Yes, Your Honor.

THE COURT: Don't you think that is beyond the powers of the Postmaster General? Isn't it rather unreasonable?

I would feel this about this, that if the order was limited and stated that so long as these advertisements are being published, and for such and such a period thereafter, because responses to advertisements may come in say a week or a day or two weeks later.

MR. CASEY: I submit, Your Honor, that if the plaintiff desisted from this enterprise they could show that to the Post Office and this order would be lifted.

THE COURT: Well, should not this order contain the limitation?

MR. CASEY: On this enterprise, as long as they continue this

enterprise. They have been found engaged in this enterprise, and all mail concerning this enterprise is stopped.

THE COURT: It is not mail concerning this enterprise that is stopped; all their business mail is stopped. And the Government does not deny that they publish books on Physics and Arithmetic as well. Why shouldn't this order contain a limitation to the effect that as long as these
35 advertisements are being published, and for such and such a period thereafter?

MR. CASEY: I believe the statute did not contemplate that such a limitation should be placed.

THE COURT: This is a pretty drastic statute.

MR. CASEY: Yes, it is.

THE COURT: It is one of the most drastic statutes we have on the books, because to hold up a person's mail would completely undermine his business and it would completely cut him off from society. He couldn't receive a wedding invitation or an invitation to tea.

MR. CASEY: Right, Your Honor, and I think the Supreme Court had exactly that in mind, in the Coyne case when they said that:

> "In view of the fact that by these sections the Postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or
> 36 correspondence connected with the prohibited business, it is not too much to assume that, prima facie at least, all such letters are identified with such business. A ruling that only such letter as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts."

THE COURT: I suppose this could be done, that an order of this kind should stand unless the plaintiff consents to his mail being opened and to the withholding of the mail that turns out to be of the improper kind.

MR. CASEY: And that is what we are doing under the stipulation, Your Honor.

THE COURT: I don't doubt at all that the law is as you state it to be, but in view of the fact that it is a very drastic remedy I think it behooves the Court to be very careful in seeing to it that it is not exceeded. You may proceed.

MR. CASEY: I submit upon the entire administrative record that was made before the agency that the order was validly issued, and that upon the decision of Judge Edelstein in the Klaw case that the present order should remain and summary judgment be granted for the Govern-
37 ment.

THE COURT: Before you resume your seat I want to go back to one matter to which you have already adverted, and concerning which I have asked a question.

I am going to assume that the Sunshine case is the law--I have to. Now, what is your distinction between the Sunshine case and the case at bar?

MR. CASEY: The Sunshine case pertains to future publication of its magazine by the defendant Sunshine Publishing Company. This Company is not publishing a magazine.

THE COURT: I see. Do you wish to say anything in reply, Mr. Donnelly?

MR. DONNELLY: Yes, sir; I can answer Mr. Casey in short order, sir.

REPLY ARGUMENT ON BEHALF OF THE PLAINTIFF

MR. DONNELLY: I have called upon Mr. Casey to produce as part of the record in this case, that is, the administrative proceedings--

THE COURT: That is before me.

MR. DONNELLY -- the first case, which answers Your Honor's question as to whether or not this isn't fraud, because they were tried on

that and found not guilty, as evidenced by this record which I would like to proffer at this time, in the absence of submission of the record of the earlier case.

38 THE COURT: Well, I think from what Mr. Casey has said that becomes immaterial. I am not going to decide whether they have committed fraud or not because no fraud is charged. That issue is not before me.

As I understand the issue it is whether an advertisement that purports to advertise obscene matter is within this statute when actually the matter that is advertised is not obscene. Isn't that the question?

MR. DONNELLY: That is correct, sir; basically that is correct.

THE COURT: I am going to take this matter under advisement for a day or two and I think I should read the administrative file and also these two or three cases.

MR. DONNELLY: With Your Honor's permission I would like to answer one point.

THE COURT: Oh, yes, take whatever time you want. This is an important matter.

MR. DONNELLY: Mr. Casey offers to have the Post Office Department lift this ban if the plaintiff says here that they won't advertise in sexy magazines. We made that offer after we won the case before the Hearing Examiner. We said that to the Solicitor, and we have pleaded that in the complaint, and his reply is attached to our complaint and sworn to; that is, Mr. Solicitor, we don't want to engage in any more controversy with you; we have won twice on your complaint; and we would like

39 to cooperate with you; if you say that we shouldn't advertise in X Magazine we won't advertise in it, because actually it is a loss to us to advertise in a magazine that might be barred by the Post Office Department. You couldn't get any inquiry or get any orders.

The answer, as shown by the complaint in this case, if Your Honor please, is that we will not accept that sort of agreement from you, but we will accept this affidavit, which is attached to the complaint, that you will only sell this book to doctors.

Now, if that's what the attitude was that they were taking at that time, sir, I can't see possibly how they would ever consider lifting this ban if we applied for it.

THE COURT: I didn't so understand Mr. Casey. I understood Mr. Casey to say, in reply to the Court's question, that if you stopped carrying this advertising you could apply for it then and the ban would be lifted.

MR. DONNELLY: But they have already refused.

THE COURT: No, you qualified that.

Are you willing to stop advertising anywhere?

MR. DONNELLY: We offered, sir, and we will stand on that offer today, that if they will tell us what books we should not advertise in we will not advertise in them.

THE COURT: No, no, that isn't what he says he would do. If you will refrain from inserting that particular advertisement anywhere then you would have the ban lifted.

MR. DONNELLY: No, sir, we will not accept that kind of censorship.

THE COURT: That is what he suggested.

MR. DONNELLY: But that is not within the boundary of his case. They are allowing us to receive mail from the New York Times.

THE COURT: Oh, that is a separate stipulation, there is no question about that.

MR. DONNELLY: As to his argument on Hornick, as interpreting this statute, I say there is a stronger case directly on this statute, and that is Olesen vs. Stannard, 227 Fed. 2d 785.

THE COURT: You haven't mentioned it before.

MR. DONNELLY: I told Your Honor I was going to submit through my memorandum--

THE COURT: No, no, no, no; I expect counsel to tell me orally everything they want me to know.

MR. DONNELLY: I know that from experience with Your Honor that you know a great deal more law than I do and I hate to be presumptuous.

THE COURT: Well, what is that citation?

MR. DONNELLY: 227 Fed. 2d 783. Now, that is a Ninth Circuit Court of Appeals decision under this statute. Hornick was not under this statute. Hornick was under the criminal statute.

41 THE COURT: What does the Ninth Circuit case hold?

MR. DONNELLY: It says that this theory they have propounded here today doesn't hold water.

THE COURT: Well, I will read the case.

MR. DONNELLY: On the Sunshine case I think we have gotten a little confused, if Your Honor please, because the case that Mr. Casey--

THE COURT: I am familiar with the Sunshine case.

MR. DONNELLY: I appreciate that. The first Sunshine case in 221 Fed. 2d was a final decision, but there is this unpublished decision of May 31, 1956--

THE COURT: Let me see the so-called unpublished decision.

MR. DONNELLY: Yes, Your Honor, I will pass it up to the Court--which is now pending. I explained this in my memorandum, if Your Honor please.

THE COURT: That has not been reported?

MR. DONNELLY: I can't find it.

MR. CASEY: Which case is this?

MR. DONNELLY: The second Sunshine case; the Post Office Department says it has not been reported.

THE COURT: Has this been reported?

MR. CASEY: No; that just came out in a slip opinion.

42 THE COURT: May, 1956, and it has not been reported? I presume it has not been reported because they wanted reargument en banc.

MR. CASEY: I assume so.

THE COURT: Then it is of no force and effect.

MR. DONNELLY: Let me read it--it is, so far as the records of the court are concerned, if Your Honor please, sir.

THE COURT: No. The first Sunshine case stands, but the second

opinion is the one in which a re-hearing has been ordered.

MR. DONNELLY: Well, maybe something in this opinion will be of some persuasion.

THE COURT: I realize I said something to the contrary a few minutes ago that if a re-hearing has been ordered of a case in the Court of Appeals that the opinion as to which the rehearing has been ordered can't stand as law; therefore it is of no force or effect either way.

MR. DONNELLY: Would the language of the majority have any persuasion on the District Court, sir?

THE COURT: Not if the Court of Appeals ordered the case to be reheard en banc. I think it would be rather dangerous to rely on it.

MR. DONNELLY: Suppose it were merely doctrine that has authority in Supreme Court decisions and the citations? I merely offer to
43 tell Your Honor what was said.

THE COURT: I will be perfectly willing to read it as a matter of information for whatever material it contains but not as an authority.

MR. DONNELLY: Well, you see, Your Honor, coming from the last case in the Supreme Court, that is, Roth vs. United States, decided in June--that is not published of course in the U. S. Reports yet; it is in the advance sheets, and it is also in 1 Law. Ed. 2, 1481. That is the last word on the law.

THE COURT: Does that case have anything to do with the issue here involved?

MR. DONNELLY: It involved the postal obscenity statute, if Your Honor please.

THE COURT: I understand, but does it bear upon the issues that are before the Court in this case? I don't recall that those three cases do.

MR. DONNELLY: The Chief Justice says that the central issue in these cases is intent.

THE COURT: Well, you have finished your argument. I can only hear reply. I don't want to hear new matter. You can reply to Mr. Casey.

MR. DONNELLY: I am trying to establish that what the Court

said in the second Sunshine case is the law of the land, and it has been reannounced by the Supreme Court, and furthermore when the Supreme
44 Court says that sex is not synonymous with obscenity I think you have a very good point on which to--

THE COURT: I am going to hold so far as the advertising was concerned that there was nothing arbitrary or capricious in the ruling of the Postmaster General that the advertisement offers to the public for sale an obscene book. I could overrule that ~~whole thing~~ holding only if I found it was arbitrary and capricious and unreasonable, and I think there was nothing arbitrary or capricious about that.

What I do have to decide is whether the statute applies where there is an obscene advertisement, or an advertisement of a book as obscene and it turns out that the book is not obscene--whether the statute applies under those circumstances.

MR. DONNELLY: If Your Honor please, in that connection we were not charged with that in the proceeding.

THE COURT: You have covered that, Mr. Donnelly. If you have anything new that you haven't covered I will be very glad to hear you, of course, because this is a very important matter, but repetition does not help the Court.

MR. DONNELLY: I realize that, sir.

THE COURT: Do you wish to add anything under those circumstances?

MR. DONNELLY: No, sir; I think I have said all I can say.
45 THE COURT: I think the Court has been very much helped by the arguments and by the memoranda of both parties, and the Court wants to read the administrative record, I think that is important, as well as reread the authorities on which the parties rely, so I will take the matter under advisement, and I will have a decision in the next few days.

MR. CASEY: May I make one comment?

I think the answer to the second part of your question there a moment ago is in the final decision of the Postmaster General and you

could find it written out there.--

THE COURT: What is that?

MR. CASEY: The final decision of the Postmaster General reasons out a portion of your last question about whether or not this statute goes that far.

THE COURT: I understand, but that is a matter that is open to the Court.

MR. CASEY: Yes.

THE COURT: That is a question of law and not a question of fact.

MR. CASEY: Yes, and the Postmaster General refers to the Rebhuhn case in his final decision.

THE COURT: What is that case, I haven't heard that mentioned before.

MR. DONNELLY: I tried that; I will be glad to tell you, sir.

46 THE COURT: What case is it?

MR. CASEY: U. S. vs. Rebhuhn, 109 F. 2d 512.

MR. DONNELLY: It was a criminal case, Your Honor, in which it held that holding a book out in the way it was held out was obscene, and that the book itself did not have to be obscene.

THE COURT: Neither of you have referred to that decision before.

MR. CASEY: No, I simply referred to it in the decision of the Postmaster General.

THE COURT: What court decided that case?

MR. DONNELLY: The Second Circuit Court of Appeals.

THE COURT: Well, gentlemen, you may come back at 1:45. It is quite apparent to me--I don't like these new arguments. I expect counsel to finish everything he has got to say and then not come back again with something new.

Has either of you anything more to say about this?

MR. CASEY: I do not, Your Honor.

THE COURT: What is the citation to the last case that you mentioned?

MR. CASEY: 109 F. 2d 512.

THE COURT: That statute has been amended after that was decided.

MR. CASEY: Yes, but I simply refer to it on the basis of your
47 last question about whether or not the obscenity can reach a book that is not in evidence.

THE COURT: That case could not have been decided under the statute.

MR. CASEY: No, it is not under this statute.

THE COURT: Then I don't think that would be very helpful.

Very well. I will take this matter under advisement.

(Thereupon at 12:30 o'clock p. m. the hearing was concluded.)

[Filed Oct. 4, 1957]

OPINION

Horace J. Donnelly, Jr., Esq., of Washington, D. C., for the plaintiff.

Oliver Gasch, Esq., United States Attorney; Edward P. Troxell, Esq., Principal Assistant United States Attorney; and E. Riley Casey, Esq., Assistant United States Attorney, all of Washington, D. C., for the defendants.

This matter is before the Court on cross-motions for summary judgment. The action is brought against the Postmaster General to enjoin the enforcement of an order directing that all postmasters mark as "unlawful" all mail addressed to the plaintiff and to return it to the senders. This order was based on the ground that the plaintiff was inserting advertisements in a number of periodicals which contained information where and from whom an obscene book could be obtained. The order is based on 39 U.S. Code Sec. 259a. The pertinent provision reads as follows:

> "Upon evidence satisfactory to the Postmaster General that any person, ... is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may -
>
> (a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, ... to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such

mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, ... of any money order or postal note drawn to the order of such person, ... and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes."

The Deputy Postmaster General who determined the matter administratively after a hearing before a hearing examiner, found that the questioned advertisement should be construed as an advertisement of an obscene book, and an examination of the advertisement leads to the conclusion that there was a rational basis for this decision. Consequently, it may not be set aside by the Court as palpably erroneous, or as arbitrary or capricious. In fact if the matter were presented to this Court de novo, the court would reach the same conclusion on this issue of fact.

The book which is the subject matter of the advertisement was not offered in evidence at the administrative proceeding, and is not before the Court. The Government concedes that the book, itself, is not obscene, but urges that this circumstance is immaterial. This Court is of the opinion that the position of the Government is well founded.

One of the things that the statute bans is furnishing information through the mails where, how, or from whom an obscene publication may be obtained. It is immaterial whether the publication tendered for sale is actually obscene, if it is represented as being such. This was the construction placed on a similar statute by the Court of Appeals for the Third Circuit in United States v. Hornick, 229 F. (2d) 120, 122, where Judge Goodrich wrote as follows:

"The statute does not say that the advertisement must be true or that the information must be accurate. What is

> forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape.
>
> "It is not, therefore, necessary for us to determine whether these pictures were obscene. The defendants did purport to give information as to where obscene matter could be obtained. That is enough to make them guilty under the statute."[1]

The contention made by counsel for the plaintiff that the order of the Post Office Department in this instance is equivalent to a prior restraint on publications and is, therefore, invalid, is completely answered by the decision of the Court of Appeals for this Circuit in Sunshine Book Co. et al. v. Summerfield, handed down on October 3, 1957.

Likewise the objections advanced in behalf of the plaintiff that the Postmaster General had no power to delegate his authority to pass upon the matter in question to the Deputy Postmaster General, and that the Government had no right to secure a review by the Deputy Postmaster General of the decision of the hearing examiner, are equally untenable.

The increase in recent years of obscene and lewd periodicals, is a serious social evil. No doubt it is a contributing cause to juvenile delinquency and to the commission of crimes by young people. The substantial literary magazines of yesteryear have all but disappeared and only a few isolated periodicals of that type still remain. Their place has been taken to a large extent by a crop of suggestive and salacious periodicals. The courts should not strain to place technical obstructions in the way of enforcement of salutary legislation to curb this undesirable excrescence. The courts have been fully cognizant of the fact that the

---

[1] See also Klaw v. Schaffer (S.D.N.Y.) 151 F. Supp. 534.

statutory remedies placed in the hands of the Post Office Department are exceedingly drastic, and their enforcement may have serious consequences. Excesses in their administration, if any should appear, can be cured by judicial review.

Plaintiff's motion for summary judgment is denied.

The defendants' cross-motion for summary judgment is granted.

/s/ Alexander Holtzoff
United States District Judge.

October 4, 1957.

[Filed October 9, 1957]

ORDER

This matter having come on for hearing on the plaintiff's motion for summary judgment and the defendants' cross-motion for summary judgment, and in accordance with the written opinion of the Court filed herein on October 4, 1957, it is by the Court this 9th day of October 1957

ORDERED that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED that the defendants' cross-motion for summary judgment be and the same hereby is granted and the complaint herein is dismissed.

/s/ Alexander Holtzoff
Judge

[CERTIFICATE OF SERVICE]

[Filed July 18, 1957]

STIPULATION

It is hereby stipulated and agreed by and between counsel for the parties hereto that all mail matter arriving at the Post Office at New York, New York addressed to Plaintiff which is being, and is to be, held there under the agreement approved by the Court the 5th day of July, 1957, and which would otherwise be returned to senders pursuant to Defendant's "unlawful" order No. 56390 dated June 28th, 1957, and which is to be so held until the further order of the Court, will there

be opened by a representative of Plaintiff in the presence of a representative of the Post Office Department, and after examination by the latter, that mail matter which is a result of, or pertains to, Plaintiff's advertisements of the book "Illustrated Encyclopedia of Sex" in magazines of the type classified by Defendant as being "sexy", including those specifically named in the final departmental decision of June 28, 1957, shall continue to be held at said Post Office and shall not be delivered to Plaintiff unless and until Defendants are so directed by order of the Court; all other mail matter so examined shall thereupon be delivered to Plaintiff.

The above agreed upon examination of mail addressed to the plaintiff shall be made once each business day in a designated room of the New York City post office at such time as shall be agreed upon by the Plaintiff and the postmaster at New York, New York or his duly designated representative.

Plaintiff agrees to furnish representatives of the Post Office Department with a list of code words and numbers which identify the magazines and separate issues thereof as the source of each order received from members of the public for the book "Illustrated Encyclopedia of Sex" and further agrees that any orders which are not identifiable as to source shall be held there and not delivered to Plaintiff as hereinbefore provided.

It is further stipulated and agreed that all postal money orders payable to Plaintiff which shall be delivered into the possession of Plaintiff shall be fully honored for payment. Defendants agree to take such steps as are necessary to carry this provision into effect.

/s/ Horace J. Donnelly, Jr.

Counsel for Plaintiff

/s/ E. Riley Casey

Counsel for Defendant

July 15, 1957

[Filed October 16, 1957]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Notice is hereby given that Cadillac Publishing Company, a Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order entered herein the 9th day of October 1957, denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment and dismissing the complaint.

/s/ Horace J. Donnelly, Jr.
Attorney for Plaintiff

196

Solicitor's Docket No. 3/126
2/24/53
Initials Illegible
February 24, 1953.

In the Matter of the Complaint That CADILLAC PUBLISHING COMPANY, INC., at New York, New York,	:	Docketed: H. E. No. 2/16 Date 2/25/53
is conducting an unlawful enterprise through the mails in violation of 39 U.S. Code, Section 259a.	:	H.E. Docket No. 2/16

COMPLAINT

The undersigned, Acting Solicitor for the Post Office Department, has probable cause to believe that under the name set forth in the caption hereof (hereinafter referred to as the respondent), there is being conducted through the mails an enterprise in violation of the provisions of 39 U.S. Code 259a (Public Law 699, 81st Congress, Second Session, Chapter 721, approved August 16, 1950), and in support of that belief alleges as follows:

(1) That the respondent now and for some time past has been obtaining and attempting to obtain remittances of money through the mails

for a book entitled "The Illustrated Encyclopedia of Sex" from persons who are readers of certain obscene, lewd, lascivious and indecent publications;

(2) That the attention of such persons to the sale of said book is attracted by advertisements thereof appearing in publications entitled "Famous Paris Models," February, 1953, issue; "Our World," March, 1953, issue; "Night and Day," January, 1953, issue; "Beauty Parade," May, 1953, issue; "Whisper," May, 1953, issue; "Frolic," August, 1952, issue; "Flirt," January, 1953, issue;

(3) That attached hereto and marked Exhibits A, B, C, D and E are photostatic reproductions of pages from some of the aforesaid publications containing advertisements typical of those mentioned in paragraphs (1) and (2) above;

197 (4) That by means of the advertising matter in Exhibits A, B, C, D and E and in similar advertisements mentioned in paragraph (3) above, respondent Cadillac Publishing Company, Inc., is soliciting remittances of money through the mails from the public and particularly from persons who read such periodicals as those in which respondent's advertisements appear for the said book entitled "The Illustrated Encyclopedia of Sex" which is described as containing obscene, lewd, lascivious and indecent illustrations and text depicting sexual organs, sexual functions and sexual relations of a highly erotic and sexually stimulating character, including "detailed step by step instructions written frankly and bluntly"; "how erection and climax in the male occurs"; "pictures of Life-like breasts"; "where women's organs have greatest sex excitement"; "Complete Color Picture Story of Womens Sex Organs"; "Techniques that bring supreme joy to the sex act for male and female"; "How sexual desire is aroused in women"; "Feminine Masturbation"; "How male organs function during intercourse"; "How female sex organs function during intercourse"; "How to use love play towards greater satisfaction in sex act"; and similar matter listed in said advertisements;

(5) It is further charged that the aforesaid book entitled "The

Illustrated Encyclopedia of Sex" is obscene, lewd, lascivious and indecent in the hands of persons who buy same in response to the aforesaid and similar advertisements and is also lewd, lascivious and indecent in the hands of minors who may purchase it through the mails in response to said advertisements.

Therefore, under the provisions of Rule 150.403 of the Rules of Practice, it is recommended that the Postmaster General issue an order to the postmaster at New York, New York, to dispose of mail addressed for delivery to and money orders drawn in favor of Cadillac
198 Publishing Company, Inc., and its agents and representatives as such, in accordance with the provisions of the aforesaid statutes.

/s/ Louis J. Doyle

Acting Solicitor.

To the Acting Chief Hearing Examiner

Of the Post Office Department.

---

188 AMENDED ANSWER

Comes now the respondent, and for answer to the complaint filed in the above-captioned cause, states as follows:

1. The complaint fails to state a cause of action upon which an order can be issued.

2. The respondent denies each and every allegation of fact contained in said complaint and demands strict proof thereof, and as to the conclusions of law and speculative conjectures, respondent moves that same be stricken and disregarded.

3. The complaint is vague, indefinite and uncertain, and contains no allegations of fact with respect to an offense against the statute invoked, but is based solely upon the conclusions and conjectures of the pleader.

4. The proceeding is an unconstitutional deprivation of respondents' right to due process of law, and is not in conformity with the provisions of the Administrative Procedure Act of 1946.

5. The statute sought to be invoked is invalid as a matter of law, and the interpretation thereof as set forth in the complaint is unwarranted, capricious and unreasonable as a matter of law in derogation of the rights and privileges accorded by the Constitution of the United States and the amendments thereto, including, but not limited to, the right to freedom of speech and of the press.

6. Neither the Hearing Examiner nor the Postmaster General has jurisdiction as a matter of law to try a respondent on the issues framed
189 herein under the statute sought to be invoked, and neither is empowered by law to act as a censor of literature and the advertising thereof.

7. And further answering the complaint, respondent pleads res judicata as to the issue sought to be presented by the complaint, in that in a prior proceeding against this same respondent (H. E. Docket No. 1/244), it was admitted and conceded by the complainant therein that the book now charged with being obscene, lewd, lascivious and indecent, was in fact not obscene, lewd, lascivious and indecent, and that as a result of said proceeding, the Hearing Examiner's Initial Decision was entered under date of August 21, 1952 (which Decision has become final and binding upon the Post Office Department and its agents and representatives, including the complainant herein), dismissing the complaint and deciding as a matter of fact and law that respondents' book, "The Illustrated Encyclopedia of Sex," was neither obscene, lewd, lascivious and indecent, nor was it advertised in a manner representing that it was obscene, lewd, lascivious and indecent; and further that at all times during said prior proceeding, the Post Office Department, its agents and representatives, including the complainant herein, knew or were in a position to know, that respondent was engaged in advertising the book, "The Illustrated Encyclopedia of Sex," in magazines and periodicals of general circulation.

8. And for further answer to the complaint, respondent pleads equitable estoppel for the reasons set forth in the preceeding paragraph hereof, and for the further reason that the magazines named in the

complaint have, with one exception, been entered as second-class mail matter under the provisions of Section 34.19, et seq, Postal Laws and Regulations, 1948, at the post office at the point of publication, and that according to respondent's best information and belief, the requirements and conditions with respect to second-class mailing privileges have
190 been met by such publications, including the provision of Section 34.46 of the Postal Laws and Regulations, 1948, requiring the filing of a copy of each issue of such second-class publication with the Postmaster at the time of the first mailing of each of such issues. Furthermore, the Postmaster General and his representatives are estopped from proceeding or acting against respondent on the allegations of the complaint that its book "The Illustrated Encuclopedia of Sex" is obscene, in that the magazines and publications in which respondent has advertised and is advertising its book "The Illustrated Encyclopedia of Sex" have been accepted for mailing by the Post Office Department, and copies of the book itself in inspection-permitted packages, as well as circulars enclosed in open-end envelopes describing and advertising same for sale, have also been and are currently being accepted for mailing at the Post Office at New York, New York, with the full Knowledge and acquiescence of the Post Office Department, notwithstanding the prohibition of Section 1461, Title 18, United States Code, providing that "every obscene, lewd, lascivious or filthy book . . . or other publication of an indecent character . . . and every written or printed . . . circular, . . . advertisement . . . giving information, directly or indirectly, where or how or from whom . . . any of such matters, articles or things may be obtained . . . is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

WHEREFORE, the premises considered, respondent prays that the complaint filed herein be dismissed and that an order be entered terminating the proceedings in favor of the respondent.

CADILLAC PUBLISHING COMPANY, INC.

By /s/ Max Shapiro

President

/s/ Horace J. Donnelly, Jr.

Attorney for Respondent

---

184 MOTION FOR SUBPOENAS OR IN THE ALTERNATIVE FOR LEAVE TO TAKE DEPOSITIONS

Comes now the respondent by its attorney, Horace J. Donnelly, Jr., and moves that subpoenas be issued to require the attendance, at the hearing of this cause, of the following named witnesses on behalf of respondent, or if such motion be denied, that leave be granted to take the depositions of such persons at the addresses indicated, either orally or by written interrogatories:

1. Giving G. Chin, 14 Clarke Avenue, Jersey City, New Jersey, and
2. Louis Cocchi, 3162 Fulton Street, Brooklyn, New York - both before Morris Sparr, a notary public, at 29 Broadway, New York, N. Y.
3. Lloyd Shaw, 412 N. Marion Street, Lake City, Florida, before John Doe, notary public, or such other person authorized to do so by law, as may be agreed upon between the parties hereto, at the office of Brannon & Brown, State Exchange Bank Bldg, Lake City, Fla.
4. Robert Ingram, 1351 Spring Street, Columbus, Georgia, before John Doe, notary public, or such other person authorized to do so by law, as may be agreed upon between the parties hereto, at the offices of Young & Hollis, Professional Bldg., Columbus, Georgia.
5. F. N. Mason, 506 Victoria Street, Harlan, Iowa, at the office of Bennett Cullison, Esq., Cullison Bldg., Harlan, Iowa.

6. Frank E. McGrath, 86 W. Springfield, Boston, Mass., at the offices of Mahony, Bryer & Coffin, 10 State Street, Boston, Mass.
7. M. Gordhamer, 2905 26th Avenue S, Minneapolis, Minn., at the offices of Mahoney, Cragg & Barnett, 2120 Rand Tower, Minneapolis, Minn.

185 8. William H. Seddon, Apartment 2-C, 4916 Jamieson Avenue, St. Louis, Missouri, at the offices of Salkey & Jones, 506 Olive Street, St. Louis, Missouri.

9. P. G. Garrison, Box 10, Landing, N. J., at the offices of Carpenter & Carpenter, 1060 Broad Street, Newark, N. J.
10. Ralph Barillari, 48 Webster Street, Newark, N. J., at the offices of Carpenter & Carpenter, 1060 Broad Street, Newark, N. J.
11. Mrs. Russel Steves, Big Flatts, New York, at the office of Jack Last, Esq., 29 Broadway, N. Y.
12. James Cahm, 52 Walker Street, Rennselaer, N. Y., at the office of Roderick T. Clarke, Esq., Rennselaer, N. Y.
13. Paul Trainor, 1007 Monroe Avenue, Rochester, N. Y., at the offices of Culley & Corbett, 65 Broad Street, Rochester, N. Y.
14. V. P. Subrahmanyan, Laboratory of Climatology, Seabrook, N. J., at the offices of Carpenter & Carpenter, 1060 Broad Street, Newark, N. J.
15. J. Hall Brooks, Bolivar, Tennessee, at the office of Ewing J. Harris, Reynolds Bldg., Bolivar, Tenn.
16. H. R. Harless, 122 Holly Street, St. Albans, West Virginia, at the office of Herbert W. Bryan, Esq., St. Albans, W. Va.
17. Miss Irene Kounelis, Lake Shore Drive, Route #1, Fond Du Lac, Wisconsin, at the office of John P. McGalloway, 104 S. Maine St., Fond Du Lac, Wisconsin.

Respondent assigns the following reasons for the necessity of the granting of this motion:

1. Each and everyone of the witnesses named will testify that he or she is an average mature adult who purchased the book, "The Illustrated Encyclopedia of Sex," from respondent on the basis of the advertisement in one of the magazines named in the complaint; that he or she had no expectation at the time of ordering same that an obscene, lewd, lascivious and indecent book would be furnished; that he or she received said book and read same and found nothing therein which offended their moral sense or which caused any obscene, lewd, lascivious or indecent thoughts, and which to them was not obscene, lewd, lascivious or indecent, either in its context or in its method of presentation of the subject, and that he or she was completely satisfied with the purchase and the validity of the instruction and information contained in said book.

2. In further support of respondent's motion, there is attached hereto and made a part hereof, true copies of voluntary statements made in writing by such persons. In this connection, should respondent's motion for the issuance of subpoenas to such persons be denied, and should respondent's motion to take their oral depositions likewise be denied, respondent respectfully moves that their depositions be taken by written interrogatories in the general form shown on the exhibit attached hereto, with complainant herein having the right to submit cross interrogatories.

3. Respondent represents that the persons named herein were selected at random from the list of persons purchasing said book on the basis of the advertisements referred to in the complaint.

4. It is further represented that the persons named above whose testimony is sought by respondent, will affirm under oath the statements made by each of them as shown by their statements annexed and attached hereto, and that such testimony is relevant, material and competent, to establish proof of the fact that respondent's book, "The Illustrated Encyclopedia of Sex," was neither advertised as, or is, an obscene book.

Respectfully submitted.

/s/ Horace J. Donnelly, Jr.
Attorney for Respondent

OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE POST OFFICE DEPARTMENT

Tr 1

Room 3237, Post Office Department

Washington, D. C.

June 16, 1953.

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

EDWARD CARLICK, Examiner.

APPEARANCES:

HORACE J. DONNELLY, JR., 730 Fifteenth Street, N.W., Washington, D.C., appearing for Cadillac Publishing Company, Inc., respondent.

WILLIAM C. O'BRIEN, Post Office Department, Washington, D.C., appearing for the Office of the Solicitor.

Tr 4

PROCEEDINGS

Exam. Carlick: Come to order, gentlemen.

Mr. O'Brien, are you ready?

Mr. O'Brien: I'm ready, and I want to move, preliminarily, to amend paragraph (d) of the complaint -- check, paragraph 2 of the complaint.

Exam. Carlick: Mr. Donnelly, are you ready?

Mr. Donnelly: Yes, I'm ready.

Exam. Carlick: Before we proceed on preliminary matters, I would like to take care of a certain matter here. The record will show that there is now brought up for hearing the case based upon complaint against Cadillac Publishing Inc., H.E. Docket No. 2/16, in which the respondent is charged with the violation of 39 U.S. Code 259a, in that he is now, and for some time past, has been attempting to obtain remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex" from persons who are readers of certain obscene, lewd, lascivious and indecent publications.

The respondent is here, represented by counsel, Mr. Horace J. Donnelly, Jr., who has been authorized by the respondent to represent him in this case.

Last Friday afternoon there was submitted in the office of the Hearing Examiners papers from counsel for the respondent entitled motion for subpoenas, or, in the alternative, leave to take depositions. As of this moment, I haven't acted on this motion for the reason it was received
Tr 5 late Friday afternoon and due to my illness yesterday.

First, I would like to call on Mr. O'Brien for his comments, if any, on this motion for subpoenas or, in the alternative, leave to take depositions. I have a copy here, which I will give to him at this time for review.

Off the record.

(Discussion off the record.)

Exam. Carlick: On the record.

Mr. O'Brien: Government counsel opposes granting the motion filed by respondent's counsel on the 12th day of June, 1953, for subpoenas, or in the alternative, leave to take depositions.

In the first place, the motion was filed practically on the eve of the hearing, and of course, even if it should have been granted, it would have been filed altogether too late for the use of any of the material involved.

The depositions and the appearances of witnesses on the following Tuesday could only have resulted in further delay of the case which has already been considerably delayed.

In the second place, the recital of the motion itself shows that there is no matter sought to be obtained through the depositions, or assuming the testimony of the witnesses, if they were subpoenaed, which would bear upon the issue before the Hearing Examiner and the Department in this case. And that statement covers, of course, the answers to the questionnaire attached to the motion, some of which are photostatted. The in-
Tr 6 formation furnished by the addressees of such questionnaires have no bearing upon this proceeding, or in this proceeding.

Any purchaser of a book who is satisfied with it would not state any issue that would have a bearing as to whether it was illegally advertised or sold through the mail.

It goes without saying, too, that you could scarcely expect the

purchaser of a book to admit, or to voluntarily state, that he had bought the book for any but a perfectly legitimate purpose, regardless of what his true motives might be.

I think that the motion is not proper and that it should not be granted.

Also, as to subpoenas, of course, this Department has no authority to issue subpoenas, as counsel well knows, and it has been repeatedly held by courts considering such issues that the Department power to issue subpoenas, or lack of such power, is not, necessarily, an element or a deprivation of due process to respondent.

Exam. Carlick: Mr. Donnelly, would you like to make a few comments regarding the motion, your motion?

Mr. Donnelly: I think I can meet Mr. O'Brien's first objection, about the timely filing of the motion, by saying that that is a question that the Hearing Examiner would decide, if the motion were granted, as when the depositions would be filed, excepting, of course, Mr. O'Brien's statement that the department has no power to issue subpoenas. Now,
Tr 7 declarations of witnesses by written interrogatories, if that were allowed, would be a question of filing nunc pro tunc, when they came in.

I think the Hearing Examiner, in the orderly conduct of this hearing has a great deal of discretion as to the timing of the offer of proof.

Now, on the second point, it has no bearing on the issues, I would call the Examiner's attention to paragraph one of the complaint, where the Government or the Department alleges that respondent is obtaining, or attempting to obtain, remittances of money through the mails for this book, and I quote now, "from persons who are readers of certain obscene, lewd, lascivious, and indecent publications."

This evidence that we would produce would show who the people are that have purchased the book from these particular advertisements, what they do, their marital status, their education, whether or not they are church people, all of which gives you a background which is contrary to the insinuation in the first paragraph of the complaint.

Furthermore, in the complaint we find an allegation, in paragraph five, it is further charged that the book, in the hands of persons who buy

same, in response to the aforesaid and similar advertisements, is obscene, lewd, lascivious, and indecent, and is also lewd, lascivious, and indecent in the hands of minors who may purchase it through the mails in response to said advertisements.

Tr 8 We merely offer to prove by people who have purchased the book through the mails from the advertisements listed in the complaints, in those magazines, in the very advertisements that are attached as exhibits to the complaint, that they are not minors, and that the book, as far as their own state of mind is concerned, is not obscene. In other words, we offer proof, and it's acceptable proof, in my opinion, as to the condition of the state of mind of the people here, having dealt with this corporation, not on some abstract theory that a prudishly sensitive person may generally object to the dissemination of any material dealing with sex or sex instruction, regardless of the validity of it.

Therefore, I say, that the evidence sought to be produced is entirely relevant to the issues and material to the proof of the falsity of the allegations of the complaint.

That's all I have to say, Mr. Examiner.

Exam. Carlick: At this time I rule that, under the rules of practice of this Department, the particular section I refer to is 150.418(a), entitled, Depositions, which fixes the date upon which an application may be filed with the Docket Clerk for the taking of testimony by deposition, the papers submitted here are too late. I will enter a written order so that counsel for the respondent has a copy of it for his record, to show that these papers are refused for filing in this case.

I want to say, further in that line, that the date for filing these

Tr 9 papers expired on March 9, 1953, the date fixed for the notice of the hearing, for the filing of respondent's answer.

The comment I was going to make, that if I had the authority to waive this rule, I believe I would have still held the same, namely, to refuse the papers for filing, because the record shows that the complaint was filed on February 25th, and that the respondent was duly served on February the 27th, 1953, and now, just two official days before the date set for the hearing, these papers were filed for the taking of depositions,

and I believe there's no merit for a waiver of such a rule if I had the authority, so it will not be necessary to go into the merits of the motion.

Mr. O'Brien, have you matters at this time?

Mr. Donnelly: I have something to say before you leave that subject. Respondent respectfully moves for a continuance of this case, for a sufficient period of time to enable the respondent to ask for a reconsideration of the Examiner's ruling, and in order to permit the obtaining of this evidence which is material and necessary to respondent's defense.

And for reasons that I will state, this investigation has taken several weeks to accumulate this information. All during this time, since the complaint was filed and the answer was due, both by agreement and at the request of the respective parties, continuances have been granted, generally on the hope of being able to work out a compromise settlement on this matter without a hearing, and it was only last week that it was

Tr 10 finally determined to proceed with the case, here, this morning. That is the reason for the delay in the filing.

Mr. O'Brien: I think, Mr. Examiner, even on that basis, counsel has had a considerable length of time in which to make the arrangements that he speaks of. In fact, I think his second letter, or, perhaps his third letter or proposal, with respect to compromise, dated back to May 6th, applied on May 13th, I think I said, so that that's about a month ago, when we stopped talking about compromises, as I look at this file.

Mr. Donnelly: I might also say, for the edification of the Hearing Examiner, that as soon as it was seen that efforts at compromise would be unavailing we immediately started our investigation culminating there, in the material, which is only a small part of the material that we have been in receipt of.

Now, I have pending before you a motion for a continuance to permit the respondent the opportunity of producing this evidence.

Exam. Carlick: The motion is overruled. It is made primarily for the question of gathering your proof in this case, and I'll indicate you've had ample time -- in fact, that though you may have been in negotiations for compromise, this still doesn't excuse you from attempting to gather your

proof. And besides, as I believe the case has been on the docket, here, for a number of months, I see no reason to warrant a continuance in this
Tr 11 case.

Anything else, Mr. Donnelly?

Mr. Donnelly: Well, can I take your remark as being that you have a maligned impression of my tactics or my work in this case?

Exam. Carlick: No, sir.

Mr. Donnelly: You mention that there is no excuse, not that you don't excuse me from it.

Exam. Carlick: You haven't shown anything in your remarks that would occasion or justify the delay. That's the only thing I meant by the excuse that I stated in my remarks. Is there anything else, sir?

Mr. Donnelly: No.

Exam. Carlick: Mr. O'Brien?

Mr. O'Brien: Government counsel, on behalf of the Solicitor, moves to amend paragraph two of the complaint, by adding thereto "and in similar publications." And "in later issues of the above-named publications". -- "and in similar publications and in later issues of the above-named publications."

Exam. Carlick: You may state your objection to such a motion.

Mr. Donnelly: I have no objection to the first part of it, that is, similar publications, subject however, to my objections, to a continuation of my objections contained in the respondent's answer as to the vagueness of the complaint, the vagueness and indefiniteness and un-
Tr 12 certainty of the complaint.

As to the second portion of the proposed amendment, I merely point out that the complaint speaks as of the time of its filing and if later issues are intended to encompass matters that have transpired since the issuance of the complaint, it would be clearly objectionable as a matter of form. However, if it is allowed, then my objections contained in respondent's answer, I ask to be still continued against the amendment.

Exam. Carlick: Let the record show that the motion to amend is allowed so that paragraph two will read with this additional language:

"and in similar publications and later issues of the above-named publications."

If there are any objections to the issues being after the complaint was filed, we will then take care of that at the time.

Mr. Donnelly: May we have an understanding then, that the respondent's answer is directed to the language of the complaint, extended to cover the additional language?

Exam. Carlick: Yes, sir. And the defenses in such answer are extended to the amended complaint -- strike that -- to the complaint as amended.

Mr. Donnelly: Now, Mr. Examiner, at this time, I would call your attention to the fact that the respondent's amended answer includes a motion to dismiss the complaint.

Exam. Carlick: Well, just one thing. I want to see first, whether
Tr 13 or not Mr. O'Brien is through.

Mr. O'Brien: I have no further preliminary matters to take up, Mr. Examiner.

Mr. Donnelly: Then, I would respectfully call the Examiner's attention to the fact that in the respondent's amended answer there is included a motion to dismiss the complaint for the reasons set forth in the answer. In other words, it's both an answer on the merits, and a motion to dismiss the complaint. I would like to have a ruling at this time from the Examiner as to the granting or refusal of the motion directed to the complaint, and I am willing to stipulate, in connection with said motion, with Mr. O'Brien, that the magazines which he has pleaded, and the volume of the book, itself, are in evidence for the purposes of the motion.

Exam. Carlick: As I read the amended answer, Mr. Donnelly, it is several times stated therein -- there are several grounds stated therein, for a dismissal of this complaint.

As I summarize these grounds, I wish you would check with your amended answer, and when I have concluded, please advise whether I have omitted any grounds.

Number one, that the complaint is vague, indefinite and uncertain.

Two, that the proceeding is an unconstitutional deprivation of respondent's right to due process of law, and is not in conformity with the Regulations of the Administrative Procedures Act of 1946.

Tr 14 Three, that the statutes sought to be invoked are invalid.

Four, that neither a Hearing Examiner nor the Postmaster General has jurisdiction, as a matter of law, to try the respondent on issues framed herein, under the statute sought to be invoked.

Four -- Five, a res adjudicata defense is raised.

Six, equitable estoppel.

I believe that about summarizes your defenses for dismissal for the respondent, but I didn't want to omit anything?

Mr. Donnelly: Yes, you omitted the first ground, that the complaint fails to state a ground of action upon which an order can be issued.

Exam. Carlick: Oh, of course, yes.

Mr. Donnelly: In other words, I am proceeding at this point, both by motion to dismiss the complaint on the basis of the pleading, itself, and, also, in the nature of a motion for summary judgment, based upon the complaint and the answer when taken together that no violation can be established or proven on the basis of the issues now framed.

And, I've offered, as I say, to concede the evidence pleaded as part of the proceeding at this time -- that is, the magazines that Mr. O'Brien's pleaded, that the Solicitor has pleaded in the complaint and the book, itself, "The Illustrated Encyclopedia of Sex."

Tr 15 Exam. Carlick: For the purposes of the record at this time, the motion is denied without going into a detailed explanation other than to summarize briefly that the complaint does state a cause of action, in my opinion; that it's not vague, indefinite; that it's not an unconstitutional deprivation of respondent's rights to due process of law, and it is in conformity with the provisions of the Administrative Procedures Act; that the statute to be invoked is not invalid; and as far as I know there is no Supreme Court decision, or any other Federal Court decision which has held that this particular statute is invalid; and the Postmaster General and the Hearing Examiner has jurisdiction to determine the issues framed

herein; that the plea of res adjudicata is not a grounds in administrative procedure -- or rather in an administrative proceeding, and is not a defense in an administrative proceeding, a good defense; likewise, equitable estoppel is not a good defense to or in an administrative proceeding.

I think that about covers the motion for the purposes of the record at this time.

I do have one comment I would like to make about the complaint which is raised by the motion to dismiss, which I haven't as yet covered, but I think it's well-covered at this time. I want to put it in the record at this time, so that parties may enlighten me on this particular matter when briefs are filed. In the complaint it was stated under paragraph one that the Respondent now, and for some time past, has been obtain-

Tr 16 ing, and has been attempting to obtain, remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex" from persons who are readers of certain obscene, lewd, lascivious and indecent publications.

As I read the allegation, it is stated there that certain publications are obscene. If that is a material allegation, it strikes me at this time that in order to have a full hearing and a fair hearing as required under the A.P.A , the Administrative Procedures Act, that their are parties here who are indispensable and are necessary to this action, namely, the publications, themselves.

At this time, however, I have ruled to deny the motion to dismiss, but I am bringing up this question because I would like to be enlightened on it in the briefs to be filed, unless Mr. O'Brien would like to make certain comments on it at this time for the record.

Mr. O'Brien: We propose to produce the publication referred to in paragraph one and more specifically named in paragraph 2, and others which will be included in the presentation as a result of the amendment of paragraph two. We submit that the character of the publications, that is, to say, that their obscene content will be self-evident from the magazines, as they are received in evidence, and that, also, in several cases, publications of which -- in which respondent's advertisements

Tr 17 have appeared and which will be here offered in evidence, have been declared non-mailable by the Department, as obscene publications.

The rulings, of course, will be submitted with the publications.

Exam. Carlick: Well, I understand that, Mr. O'Brien. But, under this complaint I must rule whether certain publications are lewd, lascivious or indecent. As I tried to point out, and I'm sure you understand, whether -- in order to have a full and fair hearing, we must have the parties, the other parties in this hearing, since, as I understand, it is necessary for me to make such a ruling.

Mr. O'Brien: Whether you must have representatives of the publications present?

Exam. Carlick: That's right.

Mr. O'Brien: I don't think so. Those publications which have been ruled upon were represented by the representatives of the publications prior to such ruling and whatever proof they had was submitted to the Postmaster General for consideration. And the information of that Department, also, in the prior proceedings.

Exam. Carlick: I don't want to drag this out any further. I believe you understand what I am getting at.

We will now proceed with the case.

As I said before, I would like to be enlightened in your briefs on that point.

Tr 18 Mr. O'Brien: Mr. Simon, would you take the witness stand?

HARRY J. SIMON

was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. O'Brien:

Q. State your name, please? A. Harry J. Simon.

Q. You are a Post Office Inspector? A. I am.

Q. For how long have you been so employed? A. Twelve years.

Q. In the course of your duties with the Post Office Department, Mr. Simon, have you investigated the use of the mails for the sale of -- strike that -- in the course of your duties as Post Office Inspector, have you had occasion to obtain copies of various magazines for use in such

investigations as might be necessary? A. I have.

Q. And did you call the attention of certain advertisements and copies of publications that you so obtained to the Solicitor's Office? A. I did, sir.

Q. Now, I hand you, for the sake of consultation, a list which sets forth the names and dates of issues of certain publications which have been tentatively identified as Exhibits 1-A, B, and so forth, and ask you to

Tr 19 state which of these publications you obtained and furnished the Solicitor's Office, at the same time tendering you the publications in question.

Mr. Donnelly: Are they marked? Are they marked for identification?

By Mr. O'Brien:

Q. Now, Mr. Simon, you've examined the list, and you previously examined the publications; is that right? A. Yes, sir.

Q. Would you just give us the numbers on the list of those proposed exhibits which you secured? A. I secured the publications and advertisements from 1-A to 1-Q, inclusive, with the exception of 1-F and 1-P.

Q. And how did you secure these publications, Mr. Simon. A. Most of these publications were purchased on news stands. Several of them were received by mail.

Q. That is, you subscribed to them, or bought them through the mail? A. The Chief Inspector's Office has obtained them through the mails as a result of subscription.

Q. We are offering in evidence the publications which have been identified by the Inspector and submitted to Mr. Donnelly for examination, and which, as we will show, contain advertisements either duplicates of those attached to complaint or similar to those attached to complaint in this case.

Tr 20 Mr. Donnelly: May I have the privilege of examining the Inspector on this identification?

Exam. Carlick: Yes, sir.

Mr. Donnelly: As I understand your testimony, Mr. Simon --

Inspector Simon -- you obtained the proposed exhibits 1-A through 1-Q, inclusive, with the exceptions of Exhibits F and P; is that correct?

The Witness: That's correct.

Mr. Donnelly: In other words, you have checked on this list which I have in my hand those that you obtained yourself?

The Witness: Yes, sir.

Mr. Donnelly: And you obtained those by purchase from a news vendor or news stand?

The Witness: Yes, all with the exception of Night and Day, Headquarters Detective, and Our World. Those were received by mail. The rest of them were purchased on news stands.

Mr. Donnelly: By you?

The Witness: Yes, sir.

Mr. Donnelly: And were they purchased on or about the date of the issues as shown by the exhibits themselves?

The Witness: No, sir, these magazines, from my experience, are published, oh, sometimes three or four months in advance of the date of purchase. You can go out on the street now and buy, probably, a September issue of some of these publications.

Mr. Donnelly: Well, covering what period of time were these
Tr 21 purchases made by you from the news stands? Starting when, and when was the last one?

The Witness: Well, it was on various dates. I don't recall the specific period of time, but it was prior to the date of the complaint. I would say within six months prior to the date of the complaint, approximately.

Mr. Donnelly: Would you have any definite recollection as to Exhibit 1-A, the August, 1952, issue of Frolic, as to when you purchased that issue from the news vendor?

The Witness: No, sir, I don't recall. I have it over at my office. I did purchase it. And I had it filed away. It wasn't turned over until just prior to the date of the complaint along with these other publications.

Mr. Donnelly: And was it purchased prior to August, 1952, as you recall?

The Witness: It probably was.

Mr. Donnelly: Would it have been purchased a month prior to August, 1952, if you recall?

The Witness: I can't say. I don't recall.

Mr. Donnelly: You have no independent recollection of it?

The Witness: No, sir, no, I don't, on that particular publication.

Mr. Donnelly: Now, where is the complete magazine, Our World, 1953 issue?

The Witness: It was probably destroyed. What we generally do is
Tr 22 clip the advertisements from the magazine for the purposes of making an investigation. Then, we retain the magazines for a -- oh, several months, and thereafter destroy them.

Mr. Donnelly: Do you know of any source within the Post Office Department where you could obtain a copy of the complete magazine?

The Witness: In some instances, they are available. At times, though, the Division of News and Periodicals retains copies of the magazines that are submitted to the Department by the publishers from time to time.

Mr. Donnelly: Is that the Office of the Post Office Department that has charge of the administration of the second class privilege mail license?

The Witness: Yes, sir, granting of applications for second class permits to publishers.

Mr. Donnelly: The same question as to the May, 1953 issue of Our World, marked for identification as Departmental Exhibit 1-M. You have a note in here, tear sheet. Do you have access to the complete publication?

The Witness: I don't know whether we have it or not. I just turned over the advertisement or the publication itself to the Solicitor's Office.

Mr. Donnelly: And the same question as to that marked Exhibit 1-O and 1-Q, 1-B, 1-C, 1-D, and 1-E, all for identification. Do you have the complete edition?

Tr 23 The Witness: No, sir.

Mr. Donnelly: Mr. Examiner, we, of course, have the objection of the immateriality and irrelevancy of this material to support the allegations of complaint. I contend that they are certainly not germane to this issue as to whether or not this book, Illustrated Encyclopedia of Sex, is an obscene, lewd, and lascivious publication.

I have a formal objection, also, to the offer of Exhibits 1-B, C, D, and E, I, M, O, and Q, which are not the complete publications but merely tear sheets from those publications.

Exam. Carlick: Would you look at those Exhibits mentioned by counsel, 1-B, C, D, E, I, M, O, and Q, and tell us whether or not you withdraw those exhibits, or do you still require a rule on them, Mr. O'Brien?

Mr. O'Brien: We do not withdraw the exhibits, since there is enough in each exhibit to show the character of the magazine from which it was taken, especially in the case of 1-B, 1-D, 1-E, and 1-Q. In other words, these tear sheets contain pictures and text material characteristic of publications in which they appeared.

Mr. Donnelly: Mr. Examiner, I might add that it is a basic rule of law that when atrier of the facts is determining the nature and the character of a publication, it must be considered as a whole.

Exam. Carlick: The counsel for the Solicitor in the complaint has
Tr 24 alleged that certain publications are lewd, lascivious and indecent. I can't see how these pages from such publications can be admitted in evidence. It would seem to me you would have to take the entire, whole publication. Accordingly, I rule that those exhibits 1-B, C, D, E, I, M, O, and Q are not received in evidence, and that the other publications as identified by counsel are received in evidence.

(Departmental Exhibits Nos. 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L, 1-M, 1-N, 1-O, 1-P, and 1-Q, were marked for identification, and Departmental Exhibits Nos. 1-A, 1-F, 1-G, 1-H, 1-J, 1-K, 1-L, 1-N, and 1-P were received in evidence.)

Mr. O'Brien: Would the Examiner give counsel for the government an opportunity to try to obtain copies of these magazines. We haven't been able so far to do so, the ones from which the tear sheets have been obtained, were taken, and which have been excluded.

Exam. Carlick: Do you have any objection to that, Mr. Donnelly?

Mr. Donnelly: As to the request of counsel for the Solicitor about being allowed to bring them in later? No, sir, I have no objection, sir. I do not think they are material or relevant or germane to the issues. We are not defending these publications, here. We have nothing to do with them. They are placing the burden on the respondent, to admit any of these documents.

Tr 25 Exam. Carlick: As I realize that you object to the materiality of these publications, I am merely asking you whether or not you object to having -- to their having time to obtain copies of such publications to offer.

Mr. Donnelly: It seems to me, sir, I've been pretty well limited on the time factor and I should be given some consideration when I object to them late-filing them.

Mr. O'Brien: I'm not at all sure that we could get them, because I've made efforts in the past, and I haven't been successful so far, but it might be possible to get them from the publishers.

Exam. Carlick: Objection sustained. In the hopes of getting this hearing concluded and in fairness to all parties, and due to the fact that the counsel for the respondent didn't have the -- counsel for the Solicitor -- didn't have the publications here --

Mr. Donnelly: If I had them, I'd be very glad to give them to him.

Exam. Carlick: It is too late now, to get a continuance for the submission of such proof.

Are you through with the questioning of the --

Mr. Donnelly: The identification? Yes, I have.

By Mr. O'Brien:

Q. The other copies of publications which I propose to offer on behalf of the Solicitor were not secured through Mr. Simon, and, therefore,

Tr 26 I have no further questions to ask him.

Exam. Carlick: Any cross examination, Mr. Donnelly:

Mr. Donnelly: Yes.

CROSS EXAMINATION

By Mr. Donnelly:

Q. Just a minute, I have a note, here, I would like to find. Inspector Simon, did you testify that you called the attention of the Solicitor to the advertisements of the respondent in these publications that have been introduced into evidence? A. Yes, sir.

Q. Did you call the Solicitor's attention to the particular advertisement in regard to respondent? A. I don't recall whether that was the circumstance or whether the Solicitor asked that I obtain the various publications after it was noted by the Solicitor or the Solicitor's attention was brought -- no, I don't recall that I specifically brought the ads to their attention in the first instance. I did secure the ads at the request of the Solicitor.

Q. Now, what was the nature of that request? A. It was an informal request.

Q. What was the request? A. That I endeavor to obtain advertisements of Cadillac Publishing Company from various publications.

Q. Did you obtain any advertisements of the respondent from any other publications than those which you've identified here? A. I've had
Tr 27 a large number of advertisements.

Q. Do you recall the names of any other periodicals where you found the advertisement of Cadillac Publishing Company advertising the book, Illustrated Encyclopedia of Sex? A. I have found them in a number of magazines. I don't recall the issues, off-hand, or the publications themselves.

Q. That is magazines other than those which you've produced here today? A. Yes, sir.

Q. Do you recall, did you ever obtain any copy of the Journal of the American Medical Association -- A. No, sir.

Q. Containing a copy of this advertisement of respondent of this book? A. No, sir.

Q. The same question as to the Journal of Social Case Work?

A. No, sir.

Q. Same question as to Farmers' Market Magazine? A. No.

Q. Same question as to The Nation? A. No.

Q. Same question as to the New York Herald-Tribune? A. I don't recall.

Q. The same question as to Pastoral Psychology? A. No, sir.

Tr 28 Q. Or the Pittsburgh Courrier? A. I have seen the ad in the Pittsburgh Courrier.

Q. Do you have a copy of the ad or the publication with you? A. No, sir.

Q. Do you have one in your files? A. I don't believe I do.

Q. How about the magazine, Pulpit Digest? A. No.

Q. How about Blum's Almanac? A. No.

Q. Now, Inspector Simon, in your investigation in obtaining these advertisements of respondent go to the office of Magazines and Periodicals in the, I suppose, the Bureau of Finance of the Post Office Department. That is, the office that has charge of the second class publication mailing privilege, and seek to obtain any copies of any magazines from them? A. No, sir.

Mr. Donnelly: I have no further questions.

Exam. Carlick: Redirect?

Mr. O'Brien: No redirect.

Exam. Carlick: You are excused at this time, Mr. Simon.

(Witness excused.)

Exam. Carlick: Let's have a five-minute recess at this time.

(Short recess taken.)

Tr 29 Exam. Carlick: Back on the record.

Mr. O'Brien: The Solicitor now offers in evidence an exhibit marked for identification 1-R, the July, '53 issue of Whisper, which contains an advertisement of Cadillac Publishing Company on page 47, and with it the correspondence between this office and the Assistant Postmaster General, Bureau of Finance, showing how this exhibit came into the possession of the Solicitor, and also showing the ruling made in behalf of the Post Office Department as to mailability of the magazine.

While counsel examines that, I want to give this list to my stenographer. Apparently it's a useful list, if anybody wants copies.

Exam. Carlick: Have you any comments or objections, other than the materiality objection which you made to all the other exhibits as to this particular publication, Mr. Donnelly?

Mr. Donnelly: If the Examiner please, I have a serious objection in addition to those already mentioned, as to the informality of the offer in the sense that we have here a carbon copy of the letter, apparently, signed by the Solicitor complainant in this case, to the Bureau of Finance, Division of Newspaper and Periodical Mail, expressing his opinion as to the non-mailability of the publication and sub-part of the exhibit is a request from the Assistant Postmaster General to the Solicitor, asking for his opinion. It is hardly conclusive as to the action of the Solicitor. There is nothing shown here as to whether there was any proceedings.

Tr 30 There is nothing shown here as to the reasons for the non-mailability opinion of the Solicitor. In other words, it's an inter-office communication expressing an opinion of one member of the Post Office staff to another member.

As it stands it's highly prejudicial to the respondent because it leaves open the reasons behind, the facts behind, the opinion.

The Hearing Officer here, is not going to be bound by any opinion rendered by the complainant in this proceedings. It certainly is objectionable from the standpoint of competency, and it's definitely hearsay. It should not be admitted, and, furthermore, it's neither material nor relevant to the issues that have been framed here. I would have to have notice, in fairness, we should know whether that information was communicated to the respondent. It's an after-the-fact proposition. Apparently the publication was mailed, or was offered for mailing. You will notice from the proposed exhibit, that its masthead bears the legend that it is admitted to the second class privilege at the Post Office at New York. Whether the privilege has been revoked, whether the publication is not telling the truth when it says it has second class privileges, they are all matters of conjecture, so we have to speculate, then, as to the meaning of the Solicitor's opinion, and the action taken by the Division of

Periodicals and Magazines.

Tr 31 It's a very incomplete record, and it's certainly not entitled to be considered by the trier of the facts.

Mr. O'Brien: I think the trier of the facts can take official notice of the fact that the Postal laws and Regulations permit to the Assistant Postmaster General, Bureau of Finance, Division of Newspaper Periodical Mail, the entry or refusal of entry of publications to the second class mail matter, and this letter to the Solicitor from the Assistant Postmaster General is an original letter signed by Mr. Robertson; the Solicitor also -- the Examiner is advised by the published regulations -- is required to make rulings as to mailability of matter, and the reason for this is given here, in letter of the Solicitor to the Bureau of Finance. He says that the magazine is regarded as non-mailable under Section 36.2, P. L. & R., 1948, which is the section dealing with non-mailable indecent matter.

Mr. Donnelly: What is the section number, Mr. O'Brien?

Mr. O'Brien: 36.2.

This publication also contains, of course, and this hasn't been questioned, an advertisement of the book, Encyclopedia of Sex -- Illustrated Encyclopedia of Sex -- by the Cadillac Publishing Company, on page 47.

I think it's relevant, admissible, and there's no hearsay about it.

Mr. Donnelly: Mr. Examiner, may I point out that since you are allowed to take official notice of your Department's own regulations, that there are other items in P. L. & R., section 36.2 than obscenity, as such; and, because 36.2 is simply a copy of U.S. Code, Section 1461, the so-

Tr 32 called Mail Obscenity and Abortion Section, and other objectionable matter in the mails, so still we have no conclusive or persuasive record as to why, how, when, and what for the opinion was issued.

Mr. O'Brien: If the Examiner finds that counsel's objection is sustainable, I will call Mr. Mindel as a witness.

Mr. Donnelly: There, again, Mr. Hearing Examiner, we will be getting nowhere, because it is the rule of law that you cannot examine, or cannot accept evidence from either experts or critics so that if

Mr. Mindel were called, he would have to be asked to testify to something that would not be admissible.

Mr. O'Brien: Well, Mr. Mindel would simply be asked to testify to the matters which Mr. Donnelly claims remained a mystery from this offering of the exhibit.

That is to say, whether this exhibit was declared non-mailable because of its obscene content, or because of some other character of contents. You will notice that his initials appear on the letter as having prepared the ruling which the Solicitor adopted and promulgated.

Exam. Carlick: The proposed exhibit 1-R, which is the July, 1953 issue of Whisper -- is that the name of that publication, Mr. O'Brien?

Mr. O'Brien: That's right.

Exam. Carlick: And the related papers, namely copies, or, rather, a copy of letter dated April 17, from the Solicitor, Bureau of Finance,
Tr 33 and a letter dated April 2nd, 1953, to the Solicitor, from the Assistant Postmaster General, Albert J. Robertson, is admitted in evidence. The relaxation permitted under the Administrative Procedures, I believe, would include such evidence in this case.

(Departmental Exhibit No. 1-R, 1-R-1, and 1-R-2, were marked for identification and received in evidence.)

Exam. Carlick: The purpose of this exhibit as I gather it is, if it is to show the opinion of the Postmaster General under the non-mailability statute, may be material. But as far as I'm concerned it carries no weight in this case, if any, there is to be very little. However, it may be material in the case, and therefore, it may be admitted in evidence.

Mr. Donnelly: May I ask you to correct your statement to the record, sir, when you referred to the ruling of the Postmaster General. The exhibit does not show such a ruling.

Exam. Carlick: Let the record show that the letter is merely an opinion of the Solicitor as to the magazine in question being non-mailable under such postal statutes.

Mr. O'Brien: Well, I submit to the Hearing Examiner that the opinion as to mailability is material to this issue and the statement

thereof, contained in the exhibit, should be made a part of the record, since the Solicitor is authorized by the Postmaster General, pursuant to law --

Tr 34 Exam. Carlick: Let me interrupt, here, Mr. O'Brien. I have made it a part of the record, here. I have admitted the exhibits and the letters in this report. Would you please identify them and mark them properly for the record.

And as to the question of materiality, and weight that it carries, I will leave that up to you to place in your briefs.

Mr. O'Brien: Exhibit 1-R is a copy of the magazine named Whisper, issue of July, 1953. 1-R-1 is a letter of April 2, 1953, from the Assistant Postmaster General, Bureau of Finance, to the Solicitor, requesting opinion as to mailability of two publications, one of which is the one I mentioned, Whisper. 1-R-2 is a carbon copy of a letter bearing date April 17, 1953, from the Solicitor to the Bureau of Finance, Division of Newspaper and Periodicals Mail, replying to their inquiry and stating the publication is non-mailable under Section 36.2 P. L. & R., 1948.

The Solicitor now offers in evidence three exhibits marked for identification 1-S, 1-T, and 1-U, consisting of copies of the August issue of the magazine, Eyeful -- 1-T was the one I just identified, that's Eyeful. 1-S is Wink, of August, 1953, and 1-U is the magazine entitled, named, Titter, August, '53. All of which are mentioned and accompanied with letters. Exhibit 1-S-1, for identification, from the Bureau of Finance, Post Office Department, Assistant Postmaster General Robertson, to the Solicitor. 1-S-2 from the Solicitor in reply to 1-S-1.

Tr 35 All of these publications contain copies of respondent's advertisements similar to those offered in evidence. They all appear on page 47 of the respective magazines.

These are offered in evidence as Exhibits 1-S, T, and U.

Exam. Carlick: Mr. O'Brien, do those proposed exhibits have the same ruling of the Solicitor?

Mr. O'Brien: Yes, sir.

Exam. Carlick: They all pertain as to whether or not they are mailable under the pertinent postal statute?

Mr. O'Brien: That's right.

Exam. Carlick: Then, your objections are the same as to the materiality?

Mr. Donnelly: That's right.

Exam. Carlick: Off the record.

(Brief discussion off the record.)

Exam. Carlick: Back on the record.

Mr. Donnelly: Mr. Examiner, I have the same objections as were previously noted, with the additional objection that the documents show dates subsequent to the complaint in this case.

Exam. Carlick: That's also true of the previous exhibit received. It was the July, 1953 issue of a publication called Whisper.

Mr. Donnelly: That's right. The ruling in that case was made in April, and the ruling in this case was made in May. So, the objection holds to both of them. The complaint was served to respondent on or about the
Tr 36 latter part of February, 1953. Furthermore, this exhibit -- I'll strike that.

That's all I have to say.

Exam. Carlick: Objections are overruled. The Exhibits are received in evidence.

(Departmental Exhibits Nos. 1-S, 1-T, and 1-U, were marked for identification and received in evidence.)

Exam. Carlick: Anything else, sir?

Mr. O'Brien: The Solicitor now offers in evidence a magazine entitled Flirt, marked for identification Solicitor's Exhibit 1-V, with which also, are offered two letters, 1-V-1, a letter to the Bureau of Finance -- no, strike that -- it's a letter from the Bureau of Post Office Operations inquiring of the Solicitor as to the mailability of Flirt, and 1-V-2, carbon copy of the Solicitor's reply, stating that the magazine is non-mailable, the reply being dated June 12, 1953.

I also offer as Government Exhibit 1-W, the September, 1953 issue of the magazine entitled Whisper, and therewith Exhibit 1-W-1, and 1-W-1-A, an original and carbon copy of a letter from the Bureau of Post

Office Operations inquiring as to the mailability of Whisper and Beauty Parade for September, 1953, and sub-exhibit 1-W-2, the reply of the Solicitor to the foregoing letter, stating under date of June 12, 1953, that the magazines, namely, the September, '53, issues of Whisper and Beauty Parade, are non-mailable under Section 36. 2 of the P. L. & R., 1948.

Tr 37 I offer as Government Exhibit 1-X, September, 1953, issue of Beauty Parade, referred to in the previous letter, the previous exhibit, together with 1-X-1, which is a carbon copy of a ruling attached to this copy of Beauty Parade, and constituting a part of that exhibit. All of these are offered in evidence as 1-V, sub-numbers, 1-W and sub-numbers and 1-X.

Exam. Carlick: Do you have any other exhibits to offer in the same category?

Mr. O'Brien: No others.

Exam. Carlick: Would you like to look at these proposed exhibits?

Mr. Donnelly: I'd like very much to see them.

Again, I say, Mr. Hearing Examiner, that it's impossible for respondent to be able to fully and fairly determine and understand what this offer purports to be. Is it that these magazines are themselves obscene, or, are considered to be such by some official of the Post Office Department? It shifts the burden, improperly, to the respondent, to have to investigate, himself, as to what's behind this, whether the opinion of the Solicitor was actually accepted by his superiors, whether the magazines themselves were actually refused admission to the mails on the basis of his ruling.

We would also have to examine into the question of the knowledge that is reported to the trade, to the advertising profession, to the advertising agencies, the advertising agency that handled this account and so

Tr 38 forth. We could go on forever trying to run down the source of this very prejudicial material, and it's only offered for the purpose of trying to impress the opinion of the Solicitor's Office as to the nature and the character of these magazines.

Now, we're not here to try these magazines.

Exam. Carlick: Well, one moment, now, Mr. Donnelly, I just wanted to say that the ruling heretofore as to the objections -- as to the foundations, as I've said the Administrative Proceedings Rules as to evidence can be relaxed in this particular type of situation, and where you have official correspondence in the Department as to the relevancy and the materiality of the letters, that's another question, and until I've seen the evidence, I can't very well say at this time. But, I can say that it seems to me, off-hand from the Bench, here, that the opinion of the Solicitor on these magazines bears very little weight, if any, with the Hearing Examiner. That is, the question of the magazines, themselves, and pertinent laws and so forth.

So, the magazines and other items identified by the counsel for the Solicitor, are received in evidence.

(Departmental Exhibits Nos. 1-V, 1-V-1, 1-V-2, 1-W, 1-W-1, 1-W-1-A, 1-W-2, 1-X, and 1-X-1, were marked for identification and were received in evidence.)

Mr. Donnelly: You have my objection?

Exam. Carlick: Yes, sir, I have your objection on the record.

Tr 39 Mr. O'Brien: The Solicitor rests.

Mr. Donnelly: The respondent, at this time, moves to strike the testimony of Inspector Simon and the exhibits offered in evidence on the grounds that they are neither relevant nor material to the issues framed here. And it's certainly not competent, credible evidence to establish any prima facie case of wrongdoing by this respondent.

Exam. Carlick: For the purposes of the record, the motion is overruled.

Mr. Donnelly: The respondent moves to dismiss the complaint, demurs to the evidence, and contends that the evidence admitted does not establish prima facie proof of a violation of Section 259a of Title 39 of the U.S. Code, and for purposes of the motion, of course, we admit the truth of the evidence, that is, so far as has been produced by the Department.

I would like to have the opportunity to brief the contentions and show to the hearing officer our firm belief that an attempt has been made, here, to establish guilt by association, and that the proceeding is, so far as to what has been admitted, highly prejudicial and a very difficult thing for the respondent to meet, since there is no real issue as we see it.

Exam. Carlick: Before I rule on the motion, it occurs to me at this time that I haven't seen anyone offer the book, the publication in question, in evidence. Is that going to be offered in evidence, Mr. O'Brien?

Tr 40 Mr. O'Brien: Well, I don't think it's necessary to offer it in evidence. I will produce one, if you want it. The allegation is that this respondent is advertising and attempting to obtain remittances of money through the mails by furnishing information as to where, how, and from whom, a book, entitled "Encyclopedia of Sex" may be secured on the basis of representations contained in certain publications that the book is, in fact, obscene.

It is submitted that the descriptive language of the advertisement solicits for remittances on that basis. It says to the prospective buyer who is a reader of Titter, Wink, or Eyeful, or any of these other sexy magazines, that here is something that will titillate your sexual faculties, arouse your libido, and cater to your prurient curiosity. If that's what you want, write to Cadillac Publishing Company and get it.

The gravamen of the offense is the obtaining or the attempting to obtain the money by such means, and, of course, it might be in some cases, this has been the case, an actual fraud was committed. I don't say one was, here. But, the holding out that you will furnish an obscene article, thing, or device to any person, and soliciting remittances therefrom, through the mail, constitutes a violation of 39 U.S. Code 259a.

Exam. Carlick: That's a matter that will have to be determined by the Hearing Examiner, after the case is closed, and the usual proceedings,

Tr 41 the briefs being filed and so forth.

Going back to the motion to dismiss the evidence for the purpose that it doesn't establish a prima facie case, for the purposes of the record, the motion is overruled at this time.

Of course, let the record show, that in the initial decision, the

written initial decision, I may change my mind and decide that the material is not relevant and so forth, and that any rulings I've made from the Bench may be subject to withdrawal and overrule and so forth. I wish you gentlemen to understand that.

But, for the purposes of this proceeding, and at this time, the motions made by counsel for the respondent are overruled.

Mr. O'Brien: The Counsel for the Solicitor here, rests.

Mr. Donnelly: May we ask that the usual noon recess be taken now, so that we can be prepared to proceed with our case when we return?

Exam. Carlick: Do you feel that we should take a recess for lunch at this time, Mr. O'Brien?

Mr. O'Brien: Yes.

Exam. Carlick: Let the record show that we will recess for approximately one hour for lunch.

(Whereupon, at 12:15 o'clock p. m., the hearing in the above-entitled matter was recessed until 1:15 o'clock p. m. that day.)

Tr 42 AFTERNOON SESSION 1:20 p. m.

Exam. Carlick: The hearing in this case reconvened at approximately 1:22, this date.

Mr. Donnelly?

Mr. Donnelly: May it please the Hearing Examiner, do you wish to hear an opening statement?

Exam. Carlick: Yes, sir.

Mr. Donnelly: It is the intention of respondent to prove that, first, with respect to its affirmative defenses of res adjudicata and equitable estoppel, that there has previously hereto been tried and decided by this tribunal, a case against the same respondent, the complainant again being the Solicitor of the Post Office Department and that that case was decided favorably to the respondent. The complaint was dismissed, officially and formally, and no appeal was taken from the initial decision of the Hearing Officer.

That case also involved this same work or book, the Illustrated Encyclopedia of Sex. Now, we further intend to prove that the advertisement

contained in the exhibits admitted into evidence, here, on the Department's side, are the same advertisements that have appeared in many other types, kinds of publications. That it is not the practice of respondent to select any particular type of advertising media and concentrate on it.

I further intend to prove that respondent is a large and reputable established publishing house in the City of New York, that it deals in scores and perhaps hundreds of works of all types, including books on
Tr 43 mathematics, sewing, cooking, and every other thing that is generally known in the publishing field; that this particular book, named in the advertisement, is only one of large amount of publications and works by reputable authors that is published and distributed by this respondent.

I also intend to prove that the book in question has been sold retail by such reputable concerns as the Doubleday Company, that the book itself is not obscene and has so been held and conceded by the Post Office Department.

I intend to prove that respondent, in answer to the challenge of the Post Office Department -- that is, the Solicitor's Office -- has made a separate and independent investigation of its customers, including readers of the publications that have been offered in evidence. I further intend to prove that respondent has had no notice whatsoever of the opinion of the Solicitor with respect to Department's Exhibits 1-R, 1-S, 1-T, 1-U, 1-V, 1-W, and 1-X. Further, I intend to prove that there's no one who has ever dealt with this respondent who saw the advertisement in evidence who expected to get an obscene book or who thought he got an obscene book.

Now, with that proof, I intend to renew my motion at the conclusion for a judgment in favor of respondent.

I offer in evidence, as Respondent's Exhibit 1, the record of the proceedings in the matter of the complaint against Cadillac Publishing Company, Inc., at New York, New York, H.E. Docket No. 1/244.
Tr 44 The Solicitor's complaint in that case having been dated March 4, 1952, and that a hearing was held in this room on May 23rd, 1952, culminating in an initial decision of Hearing Examiner Haynes, bearing date, August 21st, 1952, and that the complainant, the then Solicitor of the

Post Office Department withdrew his notice of appeal from that decision on September 12th, 1952.

Now, in lieu of offering my formal copy, I think it is proper for the Hearing Examiner to take official notice of the records of his own office. Otherwise I will be happy to hand up my entire file of the pleadings and the action in this case, to the Hearing Officer. But, as I say, I think that under the rules of evidence you have the right to take official notice of the records of your own office, and I make that offer.

Exam. Carlick: Any objection, Mr. O'Brien?

Mr. O'Brien: I object to the offer until I look at the papers.

Exam. Carlick: Off the record.

(Brief discussion off the record.)

Exam. Carlick: On the record.

Mr. O'Brien: I think this has no relevance here. The question raised in that proceeding, 1/244, was whether certain circular advertisements of Cadillac Publishing Company were so phrased and presented as to solicit remittances for an indecent book, whereas -- and to represent the book in a false and fraudulent way -- and the question as to whether they were -- whether the advertisement was fraudulent in that
Tr 45 proceeding would have no bearing upon the issue here, whether the advertising comes within the provisions and purview of 259a of Title 39.

Exam. Carlick: I think, for the purposes of the record, I take official notice of that proceeding. However, as I ruled previously, if the question, the same issue was passed on in that proceeding, it is still not a defense in this case, because I do not believe a defense of res adjudicata is applicable in the pleadings in an administrative proceeding. That is, you may present that further in your briefs.

Mr. Donnelly: There's a line of cases that I can cite in support of my contention. I'll be very glad to brief them.

Now, I offer in evidence a group of papers which consist of order blanks, all identifiable to the exhibits in evidence by the code number shown on them. These are statements after the fact of the people whose names appear on those order blanks for this book, together with the postmarked envelope in which these replies were received from this

group of people.

Mr. O'Brien: Mr. Examiner, of course, these documents are, in my judgment, not admissible. I object to their reception in evidence. At best they are hearsay as to the motives and beliefs, reasons, or whatever may be ascribed to the purported customers as stated and indicated, one way or another, on these questionnaires.

And furthermore, I think that if the persons who wrote these
Tr 46 documents were present, their testimony would not be admissible on this issue.

Mr. Donnelly: Mr. Examiner, the testimony would be admissible on the issue, however, as to whether or not they are minors, if we follow the allegations of the complaint, and whether or not the book --

Mr. O'Brien: I didn't hear what you said, whether or not?

Mr. Donnelly: The book is obscene, lewd, lascivious, and indecent in the hands of persons who buy same in response to the aforesaid and similar advertisements.

Mr. O'Brien: I would like to point out also, in connection with this offer, that the addressees of the message and inquiry of the Cadillac Publishing Company were offered some type of reward for answering questions. I think it's only human nature and a pretty widely-recognized human reaction that if some one offers you something as a reward for doing something for him you are going to give him a pleasant reply to his inquiry and try to earn something which you expect to get as reward for compliance with his request, and therefore, of course, the type of inquiry, alone, disqualifies the communications from any serious weight or consideration of the accuracy of the statements in it.

Mr. Donnelly: Mr. Examiner, that cuts both ways. It is common knowledge, and I think counsel will agree, that in order to get people to do anything, you have got to make them some inducement to have them do it. Now, there is nothing said outside of the fact they are going to be
Tr 47 getting a book. And, in order to get replies, it was done, with astounding results.

Exam. Carlick: The objection of counsel for the Solicitor is sustained. I do not see where the material offered here is competent in

this proceeding.

Mr. Donnelly: I, therefore, offer proof that if these documents were admitted in evidence, or, if these people who are named in them were brought here to testify, or to give their depositions, that they would testify that they were readers of the magazines that have been offered in evidence, that they saw the advertisement, purchased the book, that they did not expect to get an obscene, lewd or lascivious book when they so acted, and that their original expectation has been confirmed after they have received and read the book.

Exam. Carlick: Such offer is, in my opinion, immaterial and irrelevant. The opinion of those who purchase the book may be varied and can make this record very bulky, but the main point is that it's irrelevant because the courts have laid down the definitions and the rules for the interpretation of advertisements, and the following of those rules. I believe I have come to the proper conclusion in this case, or will come to the proper conclusion in this case, without the opinion of lay witnesses.

Mr. Donnelly: Mr. Sullivan, would you step forth, please, and be sworn?

Tr 48 ARTHUR V. SULLIVAN

was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. Donnelly:

Q. Mr. Sullivan, youare a member of the Bar of the District of Columbia? A. Yes, I am.

Q. You are associated with my office in the practice of law? A. I am.

Q. Did there come a time in April of 1953 when you received certain instructions from me as to communicating with the respondents? A. That's right.

Q. Did you write a letter under my direction and mail the letter to respondent? A. Yes, I did.

Q. I hand you a document which I have marked for identification as Respondent's 2, for identification, and ask you if that is a carbon copy of the letter that you wrote and dispatched?

Mr. O'Brien: Off the record?

Exam. Carlick: Off the record.

(Brief discussion off the record.)

Exam. Carlick: On the record.

Tr 49 By Mr. Donnelly:

Q. Did you write that letter? A. Yes, I did.

Q. And the name at the bottom of the letter, the handwritten signature, is that your handwriting? A. Yes, that is my handwriting.

Q. That is, the name, Charlie Shelton? A. That's the name, Charles Shelton.

Q. Do you know who Charlie Shelton is? A. Yes, I do.

Q. Now, did there subsequently come a reply to that letter? A. Yes.

Q. And is that reply attached to that file of papers? A. Yes, this is the reply I received.

Mr. Donnelly: I offer this as Respondent's Exhibit 2, in evidence.

Mr. O'Brien: I don't see the relevancy of this exhibit, Mr. Examiner, and I object to its admittance to the record.

Exam. Carlick: I don't see where this carries too much weight as far as evidence is concerned, however, it will be received in evidence and shown on the record as being received as Respondent's Exhibit R-1, as identified by attorney for the respondent.

(Respondent's Exhibit R-1, was marked for identification and was received in evidence.)

Tr 50 Exam. Carlick: For the record, will you identify the exhibit received?

Mr. Donnelly: The Exhibit R-1, in evidence, is a letter dated April 10th, 1953, addressed to Cadillac Publishing Company, Department E-367, at New York, stating "I have seen your advertisement of the Illustrated Encyclopedia of Sex in the May issue of Beauty Parade" -- parenthetically, I will direct the Hearing Examiner's attention to the fact that that magazine is in evidence as Department's Exhibit 1-K -- "The order blank says over 21 years of age, and I cannot sign it because I am only 18. I am a first year pre-med student. If possible, I would still like to have you send the book, C.O.D."

Then, Exhibit 1-A is a reply from the Cadillac Publishing, Inc. "Dear Mr. Shelton" -- stating "as the regulations do not permit the filling of orders to persons under 21 years of age, it will be necessary for us to have a letter of consent from your parents or guardian giving us permission to fill this title for you."

Mr. O'Brien: I would like to ask the Hearing Examiner if this is relevant to the issue. I think the Government may offer in rebuttal the several hundred complaints from persons who are complaining of solicitations sent to minor children.

Mr. Donnelly: Well, that's a burden on the Government. We have had to meet the issues, if you please. The burden has been shifted to us, now, by the ruling of the Hearing Examiner on the motion.

Tr 51 I think his remarks ought to be stricken from the record, Mr. Examiner.

Exam. Carlick: Well, he was asked for comment and he wished to have rebuttal and I don't want to get the record into a lot of little arguments back and forth. I think we can consider it for what it's worth, and in due time, if counsel insists, he can make the proper request, but as far as striking it from the record, that's overruled.

Mr. Donnelly: I mean on his remarks about what he has.

I have no further questions.

CROSS EXAMINATION

By Mr. O'Brien:

Q. When you were requested to do this for Mr. Donnelly, Mr. Sullivan, you understood that the correspondence would be offered in a proceeding of some kind, did you? A. Well, I'm not sure whether I knew it would be offered in any sort of proceeding. We were merely conducting a test of our own to see what reply would be received in answer thereto; what final disposition of the letter would be, I wasn't in a position to know.

Q. And didn't you know at all, Mr. Sullivan, that a hearing or proceeding of some kind, with respect to the Cadillac Publishing Company was pending before the Post Office Department? A. Yes, I did.

Tr 52 Q. And did you know, Mr. Sullivan, at that time, that it involved

advertisements in certain magazines? A. Yes, sir.

Q. And did you know, Mr. Sullivan, at that time, that the magazines each contained a coupon? A. That's right.

Q. Did you inquire why you weren't permitted to use the coupon instead of using a special letter? A. I'm sorry?

Q. Did you inquire of Mr. Donnelly why you couldn't use the coupon instead of writing a special letter to the Cadillac Company? A. No, because we wrote the letter on the basis that the coupon stated that it was not to be sold to minors, anyone under 21 years of age. That's the reason the coupon was not used for the purpose of the letter.

Q. You didn't attempt to send in a coupon without a date or age on it, to find out what would happen in such event? A. No, I didn't.

Q. And in writing the letter, you did intend, did you not, to lay emphasis on the age of the inquirer, the purported inquirer? A. That's right.

Q. Do you know, Mr. Sullivan, whether this was done by a prearrangement with Cadillac? A. To my information, it was not. Cadillac
Tr 53 had no knowledge that the letter was going to be sent.

Mr. O'Brien: That's all.

Mr. Donnelly: That's all.

Exam. Carlick: You will be excused, Mr. Sullivan. Thank you very much.

(Witness excused.)

Mr. Donnelly: Mr. Shapiro?

MAX SHAPIRO

was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. Donnelly:

Q. Will you state your name and address for the record, please? A. My name is Max Shapiro, S-H-A-P-I-R-O. My home address is 750 Kappock Street, K-A-P-P-O-C-K Street, Bronx, New York.

Q. What is your occupation or employment, Mr. Shapiro? A. I am President of the Cadillac Publishing Company.

Q. Is that the company that is the respondent in this proceeding?

A. That's right.

Q. How long have you so been occupied? A. The company was organized in 1940 as the Cadillac Publishing Company, and I've been head of the company since its inception.

Tr 54 Q. What is the business of the company of which you are President? A. The business is publishing in the meaning of the work publishing, to secure authors, copyrights, of all types of books. We sell them in various ways, such as through the mails, direct mail advertising, through store distribution, and other distribution a publisher usually uses.

Q. Will you name some of the titles that you are currently distributing? A. The Complete Home Decorater, Mathematics Made Simple, Creative Psychology, How Shall I Tell My Child. Those are a few of the titles.

Q. Do you have any publications on Home Economics? A. Well, at the present time we have contracts on books that are forthcoming, such as, English Made Simple, Physics Made Simple, even Law Made Simple, if that is possible.

Q. Would you say that you are in the general publishing business? A. I would say that.

Q. Now, do you select the media of advertising your various titles to the public? A. No, I don't do that. I don't select the media.

Q. Who selects the media in your organization? A. It isn't selected from our organization. It's selected by a recognized advertising agency, Waterston and Freid, a reputable advertising agency.

Tr 55 Q. And who places the advertisements of your concern in the various media in which it appears? A. Someone from that organization places those orders with the advertising agency -- from our office.

Q. And then who places the advertisement itself in the particular periodicals? A. The advertising agency actually writes the order for the placement of the advertisement.

Q. I show you respondent's Exhibit No. 1 and ask if at any time prior to this moment you had any knowledge of that correspondence? A. I had no knowledge of this correspondence heretofore.

Q. Was this matter of Charlie Shelton ever discussed in your presence by either your lawyers or your associates? A. No, it was not.

Q. Now, what is the policy of the Cadillac Publishing Company with respect to matters of this type -- that is, the sale of this book, Illustrated Encyclopedia of Sex? A. The policy is not to fill orders for anyone who is under 21 years of age. We have a regular procedure in the office. It's a routine that if there's any requests from anyone under 21 years of age, the order is not filled. If there is a coupon that would come in in which the age is not stated, we request them to state the age. If it is under 21, we don't fill the order. I think that during the twelve years
Tr 56 we've been in business we've gone through this with the Inspectors in New York, with I think it's Inspector Battles, who has written many reports on the operation of our company.

Mr. O'Brien: I object to this extension of the answer, Mr. Examiner. He was asked a simple question.

Exam. Carlick: Objection sustained. Let's have a direct response to the question asked.

The Witness: Would you repeat the question?

Mr. Donnelly: The question is what is the policy of the Cadillac Publishing Company with respect to the sale of the book, Illustrated Encyclopedia of Sex, to persons under 21 years of age.

The Witness: The policy of the Cadillac Publishing Company is not to fill any orders from persons under 21 years of age. The routine of the office is such that the girls will automatically inquire as to age if no age is shown, and are not to fill an order if the age is under 21.

Q. Do you have any particular paraphenalia or business labor-saving devices that you use in connection with that policy and to put that policy into effect? A. Yes, we do have mimeographed types of letters, one of which includes an inquiry as to age; one includes a rubber stamp if the letter comes in without a coupon and the age is not stated we return the letter to the person sending it to us with a rubber stamp saying please
Tr 57 fill in the age -- "My age is (blank) years." We do not fill an order until it comes back properly filled out.

Q. Have you ever made any investigation to determine whether that policy was being carried out, that is, any check on your own operations? A. Yes, we have made such an investigation.

Q. And, are the results of that investigation shown in the papers that you brought here and which have been marked as Respondent's Exhibit No. 1? A. Yes, they are shown on that exhibit.

Q. Now, have you examined any of these exhibits -- I'll withdraw that question. Do you see in the conduct of your business any of the publications which carry your advertisement prior to the time when it is published? A. No.

Q. Now, I hand you -- I'll retract that. I hand you a letter and ask if you can identify that as being part of your business records? A. Yes, I can identify this as part of my business records.

Q. And the rubber stamp shown on that letter; is that the rubber stamp you were referring to a moment ago in your testimony? A. That is the rubber stamp I was referring to.

Mr. Donnelly: I mark this letter Respondent's 2 for identification, and I offer it in evidence.

Tr 58 Mr. O'Brien: Mr. Examiner, I see no relevancy in this proposed exhibit any more than there was in the previously given test letter under the name of Shelton. Furthermore, we have no actual proof, here, that that stamp was on it when it actually went out and when it came back, that Mr. Whoever-it-was wrote in, actually wrote in his age.

Exam. Carlick: Respondent's Exhibit No. 2 is received in evidence.

(Respondent's Exhibit No. 2, was marked for identification and received in evidence.)

Exam. Carlick: The objection is overruled. The exhibit is accepted at this time for whatever weight it may carry as to the proof that's being presented.

By Mr. Donnelly:

Q. Mr. Shapiro, returning again to the investigation you made with respect to people who purchased this illustrated Encyclopedia of Sex from your company --

Mr. O'Brien: May I interrupt counsel. That exhibit has attached

to it one of those questionnaires. I presume that that is not offered in evidence, or admitted.

Exam. Carlick: To clear this up. The exhibit speaks for itself. I have previously ruled that such questionnaire is not relevant and in admitting this in evidence at this time, it is only for the purpose of showing the stamp. There is no other purpose.

Tr 59 By Mr. Donnelly:

Q. Now, returning to the investigation which you say you made with respect to the people purchasing the book, Illustrated Encyclopedia of Sex, from your company, what procedures did you set up and follow in obtaining that information? A. We went to our files and took out all of the original orders with the code numbers of the magazines that are in question. We wanted to know for our own information whether any allegation such as is in question today was pertinent. We mimeographed a questionnaire to check with the people who had bought the book to see whether they thought they were going to get an obscene book, whether after they got it they thought they had gotten an obscene book, and whether they had received the book in good condition; whether they were people who were disappointed in their purchase.

We sent out about 900. We received -- I think we have here -- almost 300 answers, which, in the mail-order end of business is a tremendous response.

All of these answers show that what we were doing --

Mr. O'Brien: Now, I object to any further --

Exam. Carlick: Objection is sustained.

Mr. O'Brien: I further move to strike the question and answer dealing with something which the Examiner has held has no place in this record.

Exam. Carlick: That objection is overruled, Mr. O'Brien. I haven't said anything about his method of conducting his business as being

Tr 60 irrelevant. Please proceed.

The Witness: We wanted to know --

Exam. Carlick: I think that your answer has been made to the question on the record.

Mr. O'Brien: I think so.

By Mr. Donnelly:

Q. All right. Mr. Shapiro, when you mentioned code number what is the significance of that statement -- what does code number mean? A. Code number is -- usually we use a system of a letter and numbers so that we can identify the ad, or so that we can identify where the order came from -- in other words, what magazine, what issue, what name of the magazine that that ad appeared in and whether that order did come from such an advertisement.

Q. Now, for example, I hand you Department's Exhibit 1-F and direct your attention to page 66, and ask if you can tell the Hearing Examiner the significance of the code number, Department E-374, appearing on the order blank? A. Yes. Any order blank which would have Department E-374, which we receive which would have that number, would mean that it was a coupon clipped from Our World Magazine, of March 1953.

Q. Is that code or department number used in any other magazines, that same one, or, does each magazine have a different code number?

Tr 61 A. Each magazine has a different code number, except there are some magazines that are advertising as a group, and then the group would have the same code number.

Q. Was there any other information which you were seeking to obtain from your customers when you sent this questionnaire out, other than their reaction to the advertisement and the book itself? A. Yes, I wanted to know whether they were the kind of people, as alleged in the complaint, were they people of low character, which seemed to be implied in the complaint, so we asked them whether they go to church regularly. We asked them what education they have. And that would give us an inkling as to the type of people that were buying the book in question.

Mr. O'Brien: I think that question and answer should be stricken.

Mr. Donnelly: It's a state-of-mind question, sir.

Mr. O'Brien: Well, I don't think that you could even ascertain any of those things, or the state of mind, and since this is an effort to introduce

in evidence, I believe, what was already ruled as not admissible, this line of examination is not proper and is objected to.

Exam. Carlick: At this time, Mr. O'Brien, I believe you are jumping ahead. The motion to strike is overruled.

By Mr. Donnelly:

Q. Some mention has been made of the fact, here, Mr. Shapiro,
Tr 62 that this, the information-seeking questionnaire which you sent out, that the answers were inspired by your offer of a gift. Would you tell the Hearing Examiner the purpose of offering a gift in this letter?

Mr. O'Brien: I object to that as being immaterial, incompetent, and the ruling of the Examiner was not based on that.

Exam. Carlick: The objection is sustained.

By Mr. Donnelly:

Q. Now, have you done extensive advertising -- has Cadillac Publishing Company done extensive advertising in the past 13 years?
A. Yes, we have.

Q. In what type of -- in any particular type of media? A. Not in any particular type of media. We have ads, exactly the same ads that are opposed now, in newspapers such as the Pittsburgh Courrier --

Q. That is, ads for this particular book? A. The ad for this particular book. The ad has appeared in the New York Herald-Tribune, the Pittsburgh Courrier. It has appeared in the Pulpit Digest; it has appeared in Pastoral Psychology, which has a circulation to ministers, only. The ad has appeared in the magazine of the American Medical Association, the American Society for Social Case Work. There is no particular place that we run --

Q. Now, you're referring to the same advertisements that appears
Tr 63 in Government Exhibit 1-F, when you say that you've advertised in these other publications? A. The ad would be substantially the same. Because of limitations of space, there might be some parts that would have to be rearranged, but it would be substantially the same way as it appears here.

Q. Has an ad the same or substantially similar to that appeared in the New York Herald-Tribune? A. Yes.

Q. Has it appeared in the magazine called The Nation?

Mr. O'Brien: Just a minute. I object to this testimony. The best evidence here would be copies of the advertisements in the publications.

Exam. Carlick: Objection sustained. The witness will testify generally, but the advertisements themselves would have to be received in evidence for proof.

By Mr. Donnelly:

Q. Do you know whether or not it is a fact that your advertisements have appeared in the publications that you have named? A. I do know that.

Q. Have you seen them in the book? A. I have.

Q. That is, in the periodicals? A. I have.

Tr 64 Q. How about a magazine periodical known as Ebony. Have you ever advertised in that? A. Yes, we have.

Q. I hand you a copy of the April, 1953, edition of the magazine, Ebony, and direct your attention to page 92, and ask you if that is your advertising? A. That is our advertisement.

Q. I offer this in evidence as Respondent's Exhibit No. 3.

Exam. Carlick: Off the record.

(Discussion off the record.)

Exam. Carlick: On the record.

Mr. O'Brien stated he has no objection to the reception of Respondent's Exhibit No. 3. It will be so received.

(Respondent's Exhibit No. 3, was marked for identification and was received in evidence.)

By Mr. Donnelly:

Q. I hand you a copy --

Exam. Carlick: Off the record. (Discussion off the record.)

Exam. Carlick: Let's take a five-minute recess.

(Short recess taken.)

Exam. Carlick: On the record. Are you ready to proceed, Mr. Donnelly?

By Mr. Donnelly:

Tr 65 Q. I hand you a newspaper and two magazines which I have marked for identification as Respondent's Exhibit 4, and ask you if they are examples of your advertising of the book, your Illustrated Encyclopedia of Sex? I will mark all of these publications as Exhibit 3.

A. Yes, they are.

Q. Does the Cadillac Publishing Company advertisement appear in those publications? A. Yes, they do.

Mr. Donnelly: I offer those in evidence as part of Respondent's Exhibit No. 3.

Mr. O'Brien: No objection.

Exam. Carlick: Respondent's Exhibits and sub-exhibits, as numbered by the Reporter are received in evidence.

(Respondent's Exhibits Nos. 3-A, 3-B, and 3-C were marked for identification and received in evidence.)

By Mr. Donnelly:

Q. Mr. Shapiro, you previously testified as to a number of other periodicals and publications, including newspapers, in which this same or similar advertisement appears. Do you know that of your own knowledge? A. I do know that of my own knowledge.

Q. And does your company pay for the advertisements? A. Our company did pay for the advertisements.

Tr 66 Q. Have you seen the publications with the advertisement in it?

A. Yes, I have.

Mr. O'Brien: Excuse me, may I inquire at this stage, to clarify the record, what Mr. Donnelly covered by the words, similar advertisements.

Mr. Donnelly: Substantially similar, sir.

Mr. O'Brien: To what?

Mr. Donnelly: To the ones in evidence, here.

Mr. O'Brien: In Ebony, and Sales Opportunity?

Mr. Donnelly: In the Government exhibits.

Mr. O'Brien: Now, I think the witness has to answer that.

Exam. Carlick: Let me clarify the record the way I understand the situation, so far. As I gather it, the witness has testified that his company has advertised in these various periodicals, newspapers, the sale of this publication, namely, the Illustrated Encyclopedia of Sex, for sale through the mails and through other media. Now, as to the conclusions of the witness, as to the type of advertisement and so forth, it is not competent. The advertisements themselves will have to be placed in evidence to show the manner of the advertisements.

By Mr. Donnelly:

Q. Mr. Shapiro, do you have available copies of the magazines that you testified that you advertised in? A. I might have them available in New York.

Tr 67 Q. Do you have them with you? A. I haven't got them with me.

Q. Outside of a copy of The Nation, in which an ad has been clipped? A. I haven't got copies with me.

Q. Can you furnish them? A. I think I can.

Mr. Donnelly: I submit, Mr. Hearing Examiner, that the best evidence rule doesn't apply to testimony of this type. This is a man talking about his business, the conduct of his business, and he should certainly be able to testify from his own knowledge and the periodicals, themselves, would be merely combative...

Exam. Carlick: I differ with you, Mr. Donnelly. I think the element is the witness, here, can testify that he saw these advertisements in these various periodicals and it is on his own knowledge that he ordered them, and so forth. But, as to how they were worded, the lettering and the format and so forth, in his opinion they were the same as in the other magazines, is not proper.

Mr. Donnelly: All right.

By Mr. Donnelly:

Q. Do you have different formats for your advertising of the book? A. Well, there are variations. I wouldn't say specifically different for-

Tr 68 mats.

Q. What are the variations? A. The variations, sometimes, are dependent with the publication that they appear in. It depends

upon the censorship of the magazine itself, or the people who rule on what should or shouldn't go into that magazine in this respect.

Q. Now, Mr. Shapiro, was this type of advertising being conducted in magazines and periodicals prior to February, 1952? A. Yes, they were appearing prior to then, 1952.

Q. And you recall the previous proceeding before the office of Hearing Examiners of this Department? A. I do recall the proceeding.

Q. And prior to that proceeding, and during the time of the proceeding, were you advertising this book, was the company advertising this book in magazines of general circulation? A. We were advertising it at the time, in books of general circulation.

Q. Now, Mr. Shapiro, have you at any time since the proceeding last year and to the present time changed your position with respect to bringing the message of this book to the public's attention? A. No, my opinion hasn't changed.

Q. I asked for your position, not your opinion. Have you done anything different than you did previously? A. No, I have not done anything differently than I have done previously.

Tr 69 Q. What facts have you taken into consideration in maintaining your position?

Mr. O'Brien: I don't think that's relevant.

Mr. Donnelly: It's a state of mind.

Exam. Carlick: He can testify as to his method of operation.

By Mr. Donnelly:

Q. Do you understand the question? A. Well, my understanding is that it was questioned in this proceeding, and then I proceeded to make up this questionnaire to see whether these people were people of average intelligence and whether they are the type of people that should receive a book of this nature. Our conclusion was that the book is a scientific, educational book, and it should be available to people who read any of the magazines in question, because the results show that they were people of average intelligence, they were people who were of average education, families, and, therefore, there was no reason why the company should

deprive these people because they have read a particular magazine, from being able to secure this book.

Mr. O'Brien: I think that answer is objectionable in part at least, the conclusions of the witness as to the people.

Exam. Carlick: There are conclusions expressed by the witness, but, however, I will not strike that testimony. It is self-explaining, there, that the opinion of the witness has no weight. He is just merely
Tr 70 expressing from his own opinion what he thought. It doesn't mean it will carry any weight, whatsoever, with the Examiner.

By Mr. Donnelly:

Q. Mr. Shapiro, have you ever refused to cooperate with any representative of the Post Office Department? A. No, to my knowledge, we never have refused to cooperate. In fact, we have gone out of our way to cooperate with the Post Office Department in any question that comes up.

Q. Now, did you ever receive a call, or receive a letter from Mr. Harry Simon, Post Office Inspector, whom you see facing you, at Department Counsel's table? A. No, I don't recall Mr. Simon, nor do I recall receiving a letter from Mr. Simon.

Q. What is your position, Mr. Shapiro, as to future cooperation with the Post Office Department? A. Our position is still the same. We always want to cooperate with public officials, including the Post Office Department. We feelthat it's our duty, as good citizens, to do that, aside from any business relationship.

Q. If you were categorically asked to do something or to desist from doing something by the Post Office Department, would you cooperate? A. I think we would cooperate with any reasonable request.

Q. Including a request as to the type of -- A. Including a
Tr 71 request as tothe type of publications that we would go into. We have done that with books. We have submitted books to the Post Office Department, when you could submit them. They have blue-penciled them, and we have never put back any blue penciling. We have done exactly what the Department showed on the manuscripts, including the book in question.

Mr. Donnelly: You may cross examine.

CROSS EXAMINATION

By Mr. O'Brien:

Q. You stated, did you not, Mr. Shapiro, that your advertising is placed by this firm of Walterson -- is that it? A. Walterston and Freid, and that's a corporation.

Q. And who composes the advertisements, who prepares the text? A. The advertising agency.

Q. Now, then, I call your attention to one of the advertisements in evidence, here, in the August, 1953, issue or publication called Titter, which is Government Exhibit 1-U, on page 47, which I'll hand to you, sir. Is it your testimony, Mr. Shapiro, that the first time you saw that advertisement was in the publication? A. That question is not very clear to me.

Q. Did you see that advertisement or its format before it was inserted? A. Did I see the ad, aside from the magazine?

Tr 72 Q. That's right. Before it was put in.

Mr. Donnelly: Or a facsimile.

By Mr. O'Brien:

Q. A page proof or any copy of it? A. It's possible; it's possible.

Q. Well, does that mean, yes? Is it possible? Do you mean yes? A. I can't remember whether this was offered to us at that particular time before this particular magazine appeared.

Q. I see. Isn't that a common format used by you for these magazines? Isn't that advertisement a common format? A. It is similar to other ads that have appeared for this book.

Q. In other words, Mr. Shapiro, haven't you, as President of this company, approved this particular format of advertising for insertion in that group of publications of which Titter is one? A. Yes, we have approved this ad.

Q. Does that include, sir, the typographical arrangement of the ad? A. I would say, yes.

Q. Tell, -- yes, tell me, sir, when did you first see any of this

type of advertisement in this group of magazines? These women magazines, like Titter. When did you first see those? A. I can't give
Tr 73 you a date, off-hand.

Q. Well, it doesn't matter about the day or the month, but how long ago, approximately? A. I can't tell you when, unless I look up my records. I have not got my business records here, and unless I have the business records, I can't tell you exactly when.

Q. Well, I won't press you , sir, for exactly when. I just want to know -- A. I'll be glad to bring those records here and tell you exactly when.

Q. I'm sure you would, sir. But, I just want to get it, since we don't have any better way of ascertaining it, at this time. Would you say it's a year ago? A. I wouldn't say anything unless I have my records with me as to when.

Q. Well, don't you recollect, Mr. Shapiro, when, upon direct examination by Mr. Donnelly, that some of these advertisements had been inserted back in January? A. Yes, well, you're asking me exactly when, and I can't tell you exactly when. I know that they have been running for a considerable length of time. I can't tell you when they first started; not without my records.

Q. I'm not trying to hold you down, sir, to a specific day or a specific month. I just want to know how long, would you say. Eighteen months, since they started? A. My answer is this: that at the time
Tr 74 I remember checking my records, and comparing the time that we ran the ads, compared to the time that this last hearing took place, and that we were running ads at the time of the last hearing. That I do know. I remember checking that.

Q. And this magazine -- in this magazine, or something like it? A. Similar magazines, yes.

Q. And tell me, Mr. Shapiro, how were the payments made for these advertising publications, by the month, by the year, semi-annually, how do you pay on those? A. We receive an invoice from the advertising agency listing the magazine, the code number, and the price to be paid. Payment is made according to the usual business

practice.

Q. That's what I'm trying to find out. What is it? A. The usual business practice is about 30 days.

Q. 30 days? A. 30 to 60 days.

Q. And at that time you have to have some evidence that you're paying for something that actually appeared, don't you? A. There are times that you don't get the evidence and you hold up payment if you do not have evidence.

Q. So that whenever you have paid you have evidence that what you paid for appeared in a magazine? A. I think that would be generally true.

Tr 75 Q. That's a good business practice, isn't it, Mr. Shapiro, a common business practice? A. What is?

Q. To have samples of the advertisement in evidence, of publication, when you make payment? A. That is good practice.

Q. And who selects the key numbers to identify the publication in which the ad appears and from which you receive an order? A. The advertising agency lists the key number and gives us the information.

Q. Have you any connection with that advertising agency? A. Except that we do business with them.

Q. I see. Now, if you'll look at that ad, please, sir, you will notice that the last four words in the top part of the coupon states "I am over 21." Do you read that in there? A. I read it.

Q. And is it your practice, to insure that language in these advertisements? A. It is our practice.

Q. Now, why is that? A. I think I mentioned before, that we do not fill orders for anyone who is under 21.

Q. And why is that, sir? A. Because we're dealing with an educational book with a subject of sex.

Tr 76 Q. Do you, therefore, rule out people under the age of 21 as not fit to read this book, or this book is not fit for them to read? A. No, we don't rule it out, personally. Our opinion is that children ought to be able to read it, too. We rule it out because the law says that persons under 21 shouldn't receive a book on sex.

Q. Now, why is it necessary to put that in the advertisement, Mr. Shapiro? Do you receive orders from people under 21? To your knowledge? A. We do receive requests for books from people under 21.

Q. And you are quite familiar, are you, sir, with the fact that these advertisements will come to the attention of people under 21; is that your feeling? A. The facts, to our knowledge, are that most of the people who send the orders in are adults.

Q. I know, but you would like to answer my question, too, wouldn't you? A. Would you repeat the question?

Q. Aren't you conscious, Mr. Shapiro, from your business experience, and don't you know that these advertisements, placed in this sort of publication, will come to the attention of people under 21 years of age? A. No, we don't know that. We don't know exactly who buys
Tr 77 the magazines.

Q. If a person under the age of 21 were to sign his name and address on this advertisement, on this coupon, pardon me, sir, and send it to you with the purchase price of $2.98, you would fill the order, would you not?

Mr. Donnelly: I'm going to object to the question, sir, as it involves speculation.

Mr. O'Brien: I think it's within the knowledge of his business practice.

Mr. Donnelly: He's testified he doesn't fill them.

Exam. Carlick: Objection overruled.

By Mr. O'Brien:

Q. The question is if you receive one of these coupons advertising the Illustrated Encyclopedia of Sex signed with the name of the person, any person, and the purchase price, you would fill the order; isn't that true? A. That is true. And one of the reasons it is true is that this issue has been taken by the Post Office Department in Washington and New York City, and the conclusion --

Q. Now, just a minute, I don't want to clutter up the record with your conclusions. A. Well, I'd like to give the reasoning why we do

have that practice.

Mr. Donnelly: He does have the right to explain his answer.

Exam. Carlick: The Witness may explain his answer.

Tr 78 The Witness: We have had the Inspectors question our method of doing business in New York City, and one of the questions that they wanted to know a lot about was whether we filled and how we went about filling the orders to people under 21.

Now, it is our understanding that the form that we use meant that we were doing it in a proper manner, and that the Post Office Department opinion was, in fact, that we were doing it in a proper manner.

By Mr. O'Brien:

Q. Who at the Post Office Department told you that? A. The Inspectors. I can name some of the inspectors who have checked on the subject in New York City.

Q. Will you name them, please? A. At one time, I think Inspector Battles had made an investigation as to our method of conducting business.

Q. Well, how long ago would you say that was so, or would you say that was recently? A. I don't know how long ago that was but our method of doing business hasn't changed during all the time that we have been in business.

Q. Well, do you recall talking to Mr. Battles yourself? A. I do recall talking to Mr. Battles myself.

Q. And where was that? A. In our office and also in his own office.

Q. And when, can you tell me just when? A. It was a few years

Tr 79 ago. I don't recall when.

Q. A few years ago. Was that before you started using these advertisements, Mr. Shapiro? A. What advertisements do you mean?

Q. I mean the advertisements in the magazines such as Titter.

A. We had used similar advertisements. The question was not the advertisement; the question was of filling orders on any book on sexual education to people who are 21 or under. And it is our understanding that the same rule applied to any book on sexual instruction.

Q. And did you therefore state, and is it your policy and practice, not to solicit and fill orders from people under 21 years of age?
A. That is true.

Q. Now, as a matter of fact, Mr. Shapiro, have you not been publicly taxed with soliciting order from minors, in hearings before the Congress?

Mr. Donnelly: I object to the question. It's argumentative.

Mr. O'Brien: Isn't that true?

Exam. Carlick: As a check, as I gather, the question is whether he has been what?

Mr. Donnelly: Publicly taxed?

Exam. Carlick: Would you rephrase that question, and then we'll see whether Mr. Donnelly has an objection?

Tr 80 By Mr. O'Brien:

Q. I say, Mr. Shapiro, as a matter of fact, have you not been publicly questioned concerning the solicitation of orders from minors in hearings before the Congress, the 82nd Congress?

Mr. Donnelly: I object to the question. It's irrelevant, immaterial, not a competent question.

Exam. Carlick: Objection sustained.

By Mr. O'Brien:

Q. Now, Mr. Shapiro, isn't it a fact that you actually do solicit orders from minors, and that you receive complaints from their parents who request you not to send your advertisements to them.

Mr. Donnelly: I'll object to the question.

Exam. Carlick: One question at a time, Mr. O'Brien. I think there are two questions asked, there, if I'm not mistaken, sir.

Mr. O'Brien: Well, there could be a comma in the question, I guess.

By Mr. O'Brien:

Q. You have received complaints, have you not, from parents about your advertisement for the Encyclopedia of Sex sent to minors?

Mr. Donnelly: I object to the question as not within the issues here.

Exam. Carlick: Objection overruled.

Tr 81 Mr. Donnelly: It's too broad a question.

Exam. Carlick: The question as I put it is: whether or not he has received complaints from the public as to the advertisement of this particular book.

The Witness: Well, not particularly these ads in question. I might have received some complaints from a direct circular that I sent out.

By Mr. O'Brien:

Q. And how long ago did you say those complaints were received.

Mr. Donnelly: Objection. We don't know what they are. We have no way of --

Exam. Carlick: Objection sustained. You will be more specific, Mr. O'Brien, on this particular matter.

By Mr. O'Brien:

Q. Isn't it a fact, Mr. Shapiro, that despite what you said to Mr. Donnelly about policy, that you are now continuing to solicit remittances of money through the mails for the Encyclopedia of Sex, from minors?

A. That is an untruth.

Q. That is an untruth. I offer you for examination a circular of Cadillac Publishing Company and ask you if this is one of your advertisements?

Mr. Donnelly: Answer the question yes or no.

The Witness: The question is whether it's a circular of ours.

Tr 82 The answer is, yes.

Q. Do you know whether or not the addressee is a minor?

Mr. Donnelly: Now, I'm going to object to the questioning along this line on the grounds that it's not within the issues framed here. Apparently this is a circular, apparently the type of the same circulars involved in the previous case on which a decision was rendered in our favor, and it has nothing to do with the issues framed here, as to whether he is selling by these advertisements, here, today, to minors.

Exam. Carlick: Mr. Donnelly; referring to the general outline, you might call it, of the method of doing business by the respondent, here, I think that question is perfectly all right. You may answer the question. As I remember it, it was whether or not it was sold --

The Witness: Whether this is a minor.

Mr. Donnelly: Whether he knows that that was sent to a minor.

Exam. Carlick: Whether that's directed to a minor -- whether that particular circular was directed to a minor?

The Witness: I have no particular way of knowing from the stamp whether this particular person was a minor. I could tell you what our business procedure was.

Mr. Donnelly: I don't know. I'm going to have to object.

Mr. O'Brien: All right.

Mr. Donnelly: The answer is no.

Tr 83 By Mr. O'Brien:

Q. That is a current mailing, is it not, sir? A. I can't tell you whether it's a current mailing or not.

Q. Have you ever received complaints from the Adams family, that is, the family of the addressee on that envelope? A. I couldn't tell you without my records.

Q. But, isn't it a fact, sir, that you are currently receiving complaints from the families of children who receive similar circulars?

Mr. Donnelly: I'll object to the question. In the first place, let's find out what the complaints are. We haven't had any evidence here as to the fact that there's ever been complaints. Complaints of what?

Exam. Carlick: That's what he's asking the witness.

Mr. O'Brien: He's identified this circular advertisement of this book which was mailed by him, and he knows what I'm talking about -- complaints from parents who received these advertisements of this very book, the Encyclopedia of Sex, or which were sent to their children.

Mr. Donnelly: Well, I object to the characterizing of the correspondence as complaints. It's an attempt to prejudice the record.

Exam. Carlick: The Witness can answer whether or not he's received any complaints or not. Whether in his opinion they were

complaints or not. If there are no complaints, in his opinion, he can
Tr 84 so answer it. And if he thinks he did receive complaints, he can enlarge upon it, explain what kind of complaints he thinks they were.

Mr. Donnelly: Do you recall anything about these people?

The Witness: I don't recall anything about these people in question.

By Mr. O'Brien:

Q. Do you recall whether you are currently, I mean, within the last few months, receiving complaints concerning the mailing of advertisements of this publication, Encyclopedia of Sex, to minors?

Mr. Donnelly: Same objection.

Exam. Carlick: Objection overruled. You may answer.

The Witness: Unless I go through my correspondence, I can't tell you what's in that correspondence, whether there are complaints in the office, or not?

By Mr. O'Brien:

Q. Isn't it a fact, Mr. Shapiro, that within the past few months, and prior thereto, but particularly within the term of this proceeding, the pendency of it, you have received complaints from parents who stated that you sent their children, their 15, 16-year old children advertisements of the Encyclopedia of Sex?

Mr. Donnelly: I object to the question as argumentative.

Mr. O'Brien: Cross examination on the testimony is permitted.

Tr 85 Exam. Carlick: The witness may answer it.

The Witness: I can't give any details on complaints unless I have correspondence to refer to.

By Mr. O'Brien:

Q. Do you know, sir, as a matter of your business practice and experience, that your mailing list contained the names of minors?

A. We don't know, to our knowledge, that there are minors on the mailing list that we send out mail to.

Q. I see. A. In fact, there's a little more to it. There is

every precaution taken on the securing of the mail on this, to make sure in every way possible that there are no minors. There is absolutely no intention on the part of Cadillac Publishing Company to distribute the circulars to any minor. There never has been any intention on the part of Cadillac to do such a thing.

Q. Now, referring, again, sir, to the advertisement in Titter, which is there beside you. When you receive a reply to that advertisement, under the name filled out, do you make any further check to find out whether this person is 21 years of age, you said in the ad? A. No, we make no further check, because we have consulted with the Post Office Department and we've consulted with our own attorneys who advised us that we were operating in a proper manner to fill an order this way.

Tr 86 Q. Don't you consider, Mr. Shapiro, that leaving that little short sentence in there is merely a temptation to a minor to sign his name and address and obtain the book.

Mr. Donnelly: I object to the form of the question, sir.

Exam. Carlick: I will sustain the objection.

By Mr. O'Brien:

Q. Don't you know, Mr. Shapiro, that a minor who wants the book may sign the coupon regardless of that statement that he is over 21?

Mr. Donnelly: I object to the question. It's argumentative.

Exam. Carlick: Objection sustained.

By Mr. O'Brien:

Q. Now, Mr. Shapiro, why were these advertisements placed in this particular type of media, devoted, as you see that magazine, largely to pictures of women in various stages of undress? Why was that media selected with your approval? A. We don't particularly select these magazines for our approval. Our advertising agency recommends publications to us. He feels that the advertisement can appear profitably. It's upon his recommendation that we follow through. Our further investigation shows that the people who are reading these magazines

in question are perfectly normal people, the same people that read any other magazine.

Q. Will you tell us, please, why this particular type of advertisement that you have before you in Titter, page 47, has such a
Tr 87 large caption, reading, Illustrated Sex Facts, with Sex Facts in inch and a half letters -- they're large letters? A. The reason you see a big ad there is probably the rate in the magazine is very little. They probably have very little circulation. I think I said before, that the Post Office said that it might be best for the public not to read such a magazine -- for the public not to run the ad in such a magazine. We might go along with the Post Office Department on that.

Q. Tell me, why was the main emphasis put upon this big heavy caption, Illustrated Sex Facts? A. What we do here is follow advertising procedure. I think you've seen ads advertising a cigarette with a beautiful girl in half undress. It has nothing to do with the cigarette.

Q. Is there a beautiful girl half undressed, here? A. We don't use any beautiful girls. We just tell them what we have in the book.

Q. Why do you use a different type of advertising caption and presentation than in such publication as Salesmen's Opportunity, Respondent's Exhibit No. 3-C? A. I think I mentioned before that magazines and newspapers themselves have censorship departments, not only on a book on a sex subject but it might be a book on any subject, it might be on any other product. We have to follow the censorship of the particular magazine which we're appearing in.

Q. Now, Mr. Shapiro, isn't the real purpose of this adver-
Tr 88 tisement in Titter to encourage people to buy it for curiosity about the sex illustrations and these other highly provacative subjects which are listed in this large advertisement. Isn't that the purpose of the ad?

Mr. Donnelly: I object to the question. It certainly calls for speculation. It's argumentative. It speaks for itself. You have the ad in evidence.

Exam. Carlick: Objection sustained.

Mr. O'Brien: Well, it seems to me since we're talking about the state of mind of the respondent, we have a right to make that inquiry.

Mr. Donnelly: I have no objection to an examination of his own state of mind, but if it's the state of mind of other people, that he doesn't know anything about --

Mr. O'Brien: I'm asking about his own state of mind. Wasn't the purpose of the use of this advertisement, setting it up here, in this type of media, in this manner, to catch the attention and solicit the money, the remittances from people who are pruriently interested in sex?

Mr. Donnelly: I object to the question as purely argumentative. Prurient doesn't have any particular sense.

Exam. Carlick: I agree. The objection is sustained. The Witness has testified that this agency and the magazines control the manner in which the format in which the various advertisements appear.

Tr 89 Mr. O'Brien: I don't think that's true, Mr. Examiner. I think he approved the advertisement, he approved the format. He said he paid for it. If he didn't like it he could have changed it. No advertiser is subject to the whims of an advertising agency, I don't believe.

Exam. Carlick: I agree with you, Mr. O'Brien. You can take it to be the advertisement of the respondent. He's approved it. But --

Mr. O'Brien: I'm asking him now his motive in inserting the ad in this fashion in this position, in this publication -- in this type of publication.

By Mr. O'Brien:

Q. Isn't it to cater to the prurient who have a pornographic interest in the book?

Exam. Carlick: Well, for further clarification of this, I just want to say that any motive is immaterial to this case. If he wanted to advertise it as prurient, as to what the ad says, it would be judged by what the various persons reading the book, not what

the respondent, thinks.

Mr. O'Brien: That's all.

Exam. Carlick: Any redirect, Mr. Donnelly?

REDIRECT EXAMINATION

By Mr. Donnelly:

Q. Mr. Shapiro, do you have any connection with any of the publications which have been shown here today -- either ownership
Tr 90 or policy-making for them, or any other type of connection? A. I have no connection at all with any of these magazines.

Q. Now, when you get a bill for the advertising in a particular publication, from your advertising agent, is the magazine itself attached to the bill, or do you get what is commonly known as a proof of publication? A. No, there is nothing attached to the bill itself. There are proofs of the magazine, or proofs of the ads sent to us. I think we call that a checking copy.

Q. Mr. Shapiro, has anyone ever told you that it is incumbent on you or on your firm to investigate the age or any other characteristics of persons who are sending you orders for your publications? Do you understand the question? A. I do not understand the question.

Q. Have you ever gone into the question of your responsibility to ascertain who your customers are? A. I have gone into that question.

Q. And what did you find from your investigation, your having gone into that question? A. I found that a statement of age was enough for me to do, if the age was 21 or over, to fill an order on this book.

Q. Do you know of any requirement of law that says that you must go out and investigate everyone who says I am over 21 years of age as to whether or not they're telling the truth or not?

Tr 91 Mr. O'Brien: Just a minute. Excuse me. I want to object to the question. He has asked you now about law. It seems to me that that's something aside from the function of this witness to answer.

It's sort of an argumentative inquiry.

Exam. Carlick: Objection sustained. The answer will be stricken.

Mr. Donnelly: No further questions.

Exam. Carlick: Recross, Mr. O'Brien?

Mr. O'Brien: No, sir.

Exam. Carlick: You will be excused. Thank you very much, Mr. Shapiro.

(Witness excused.)

Mr. Donnelly: I ask the Hearing Examiner to take judicial notice and official notice of the Regulations of the Post Office Department in the Postal Laws and Regulations, edition of 1948, particularly with respect to the second class mailing privileges and conditions.

Exam. Carlick: For what purpose?

Mr. Donnelly: For the purpose of establishing the affirmative defense of respondent that if this book, Illustrated Encyclopedia of Sex, is an obscene book, then it should be denied the mails in the first instance, under Section 1461, which is Section 36.2 of P. L. & R., and in the second place, that if the -- if it is the theory of the Department that the advertisements in evidence contain information as to
Tr 92 where to obtain lewd, lascivious, or obscene publications, under both sections, then, -- well, they're both the same section, one's in the Criminal Code and one's in the Postal Regulations -- the same section would ban the magazine automatically at the point of deposit in the mails.

In other words, the law prescribes, fixes a duty upon the Post Office Department not to accept any material for mailing and it clearly says that such material, and I'm quoting: "is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter-carrier."

Consequently, I ask you to take judicial notice of your own regulations. It is prescribed that these publications, if they contain information as to where to obtain an obscene book, should not be allowed to

be held up to the mails, before they're ever deposited. In other words, should not go through the mails.

Exam. Carlick: That's matter for departmental procedure. Here, we are proceeding under a statute which I am required by, to preside and determine a certain issue. I do not see where the Post Office Regulations is at any particular point pertinent, and therefore, your motion that we take official notice of the certain post office regulations is denied.

Mr. Donnelly: Sir, May I have one moment?

Exam. Carlick: Yes.

Mr. Donnelly: You have not examined the exhibits. At least you haven't done so in my presence. You will find that the great ma-
Tr 93 jority, the large majority of the exhibits offered by the Department bear on the masthead of the publication a statement, admitted to second class mail privileges of the Post Office of so-and-so, such-and-such a date. Now, you, with an open mind, you will say that theoretically, or in vacuo, you are waiting to receive all the facts in the case, and are waiting to apply the law. You wouldn't know what second class privilege means unless you go to your regulations, and there are set forth the requirements to permit entry of these publications into the second class privilege. It states what types may be admitted.

Now, there's been no proof offered by the Government, unless they intend to plead surprise, and ask to rebut now, that these publications don't have second class privilege, and it's a lie. But I say they are bound by their own evidence, unless they want to plead surprise.

They are second class publications. Now, you've got to know how they came to be that. And, you can only find that out in the Postal Regulations.

Mr. O'Brien: Well, I say in answer to that, Mr. Examiner, that it's possible that some of these publications actually have second class entry; others have none; others are in the stage of applying for second class entry, and the regulations require a publication, when it does so, to put something on the masthead about it, and also to make a deposit. But, we'll assume, for the purpose of replying to Mr. Donnelly,

something which is not actually a fact, that they're all entered as sec-
Tr 94 ond class publications. Such an entry does not guarantee for all time that each of the several and succeeding issues of the entry of second class matter will be mailable; not even if they pass through the mails does that mean that they don't contain something which might be contrary to law.

But we have here, in addition to that, attached to several of these government exhibits, plain statements that they're not mailable, and they -- many of them -- have second class notices on their masthead, or editorial page, in the caption, so I don't see where that has any relevancy to the issues, nor does it indicate the Post Office Department has been remiss in any way. We don't guarantee that any publication will be, as I said, mailable for all time.

It might contain an advertisement of a lottery, for example, or some other matter which is not properly carried through the mails.

Mr. Donnelly: Thank you, Mr. O'Brien; I couldn't have argued my case better, because on these exhibits that you offered at the end of your case, with the statements of the solicitor that he regards the magazines as non-mailable, establishes conclusively, if you carry it on to the next extreme, that those publications never got in the mail, and, therefore, how does the statute apply?

Mr. O'Brien: No, it doesn't. It doesn't mean that at all, be-
Tr 95 cause in order to apply for second class entry, Mr. Donnelly, and I'll accept your compliment for assisting you, sir, in order to make an application for second class entry, you, as an old habitue of the post office department, should know that you go to the Post Office, offer your publication, deposit them in the Post Office with a fee, and, depending upon how much postage you have to cover, and then the Postmaster sends a sample to the Assistant Postmaster General with the application for admission.

Now, they have been deposited in the Post Office and the Postmaster -- or the Third Assistant sends it down to us, and he gets a ruling before he accepts or rejects the entry.

Mr. Donnelly: Would you state categorically for the record,

Mr. O'Brien, that exhibits S, T, U, V, W, and X, which were declared unmailable by the Solicitor's Office, went through the mails?

Mr. O'Brien: I will state categorically only that which I have good reason to believe, and that I've already stated, sir.

Exam. Carlick: Let's go on. Official notice has been denied.

Mr. Donnelly: I call on the Solicitor, the Counsel for the Solicitor, to produce the records of the Post Office Department with respect to the second class entry records of those publications, unless he's willing to stipulate with me that the mastheads of the magazines themselves contain a true statement where they say that they are entered on a second class privilege.

Tr 96 I might say that I didn't make this timely because I had an understanding with Mr. O'Brien last week that I wouldn't be required to file this notice to produce because we'd be bound by what the magazines themselves showed as to second class entry.

Mr. O'Brien: Well, the Solicitor is not going to accede to the motion to produce. The issue which Mr. Donnelly is trying to raise as to second class entry is strictly a red herring, and doesn't at all bear upon the question as to whether or not his client is advertising and offering to sell a book by means of these publications of this character which is so described as to lead readers to remit money through the mails for obscene articles.

Exam. Carlick: The motion to produce is denied. I'm not here for argument on this. Motion is denied, and so is that as to equitable estoppel as a defense.

I ruled on that, and if, after pursuing the matter and writing the initial decision we find that I am in error, we can reopen the case in the authority given under the rules and take additional evidence. At this time, I'll deny this motion to produce.

Mr. Donnelly: Well, that isn't a notice to you. That's a notice to him to produce. Now, if he refuses to produce, then I can proceed by secondary evidence, if it's permissible. Then, I'll go upstairs and ask someone in that office to come down here and testify.

Exam. Carlick: I think I made myself pretty clear on this, Mr.

Donnelly. It is not admissible.

Tr 97 Mr. Donnelly: Off the record, if you don't mind?

Exam. Carlick: Let this be on the record. I thought that this was in the form of a motion pursuant to a notice to produce directed to the Solicitor.

Mr. Donnelly: Now, to clear the record so as to get it straight. The Solicitor's representative, having refused to accede to the notice, I am then offering proof through the records of the Post Office Department that these publications which claim to have second class privilege, have such privilege, according to the records of the Department.

Exam. Carlick: That offer of proof has been denied.

Is there anything else?

Mr. Donnelly: I have no further questions. I will rest.

Exam. Carlick: Do you have anything else, Mr. O'Brien?

Mr. O'Brien: We do not propose to offer anything further.

Exam. Carlick: I assume for the record that you wish to file proposed findings of fact, Mr. Donnelly?

Mr. Donnelly: I'll do anything that's agreeable with everyone else. Whatever you ask for I'll be willing to do.

Exam. Carlick: Well, you have the privilege, under the rules, of finding, filing proposed findings of fact, and I'm asking whether you propose to do so?

Mr. Donnelly: Well, if it's customary, I'd like to do so.

Exam. Carlick: It's customary if you wish to do so. If you don't

Tr 98 wish to file them, you don't have to file them. I'm not demanding them. I'm only asking you this: if you wish to file them. I have the privilege of requesting them, but I am asking at this time if you wish to file them?

Mr. Donnelly: Well, shouldn't I first know, sir, whether the complainant is going to do the same thing?

Exam. Carlick: I'll grant you that. Do you wish to file, Mr. O'Brien?

Mr. O'Brien: Yes, I do.

Mr. Donnelly: Well, then, definitely, I will acept the invitation.

Exam. Carlick: That clears that up.

Mr. O'Brien: Something else please, before I forget it, and I've forgotten it a few times already. I would appreciate, sir, that attached to several Government Exhibits, here, is correspondence which belongs in the file of the Solicitor, and we would like to replace the original letters and carbons with copies for your record and return the official file to their proper place.

Exam. Carlick: All right, sir.

Is there anything further by you, gentlemen?

Mr. Donnelly: Outside of the motion of the respondent, of course, to dismiss the proceedings on the whole record made at the conclusion of the whole case. You don't wish to hear argument on that, I'm sure?

Tr 99 Exam. Carlick: No, sir, you can make your argument in writing in your proposed findings.

The order setting the date for proposed findings will be made after the transcript is completed.

Let the record show that the case is closed at approximately 3:45, this date.

(Whereupon, the hearing in the above-entitled matter was closed at 3:45 o'clock p. m.)

October 29, 1953.

13 INITIAL DECISION OF HEARING EXAMINER

The complaint and notice of hearing were delivered to Respondent on February 27, 1953, in the manner provided by the Rules of Practice. Respondent filed written answer which was superseded by an amended answer. After a number of continuances either mutually requested by the parties or on request of one party or the other, and for good cause shown, the hearing was finally continued to June 16, 1953. On June 12, 1953, Respondent deposited with the Docket Clerk of the Office of Hearing Examiners, its Motions for Subpoenas Or In The Alternative For Leave To Take Depositions. This Motion was denied at the hearing which was conducted before me on the said date of June 16, 1953, for the reasons that the Department does not have authority to issue subpoenas and as to the alternate request, that it was made too late. At the hearing,on motion of the Solicitor, paragraph (2) of the complaint was amended by adding thereto: "and in similar publications and in later issues of the above-named publications". On request of the

14 Respondent, its amended answer is deemed to extend to the complaint as amended. Proposed findings of fact, conclusions of law and supporting reasons were filed by both parties. Without objection by the Solicitor, the Respondent filed on September 16, 1953, its reply to the Solicitor's proposed findings. The entire official record, including the transcript of proceedings, exhibits, pleadings and other relevant papers, has been considered by me in arriving at this decision.

The enterprise alleged to be in violation of the statute involved is averred in the complaint to be two-fold in nature. It is in substance, (1) the obtaining or attempted obtaining of remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex," hereinafter referred to as the Encyclopedia, from persons who are readers of certain obscene, lewd, lascivious and indecent publications, by representing to such persons that the Encyclopedia is obscene, lewd, lascivious and indecent, and (2) that the Encyclopedia is obscene, lewd, lascivious and indecent in the hands of those persons who purchase it in

response to Respondent's representations in such publications, including minors.

The Respondent's answer denies each and every allegation of the complaint and the complaint as amended, and also includes a motion to dismiss the complaint on the ground that the complaint and the complaint as amended, fails to state a cause of action. This motion was preliminarily denied at the hearing.

The investigating inspector testified on behalf of the Solicitor and
15 identified a number of publications which were received in evidence: August 1952 issue of "Frolic" magazine (Dept. Ex. 1-A); May 1953 issue of "Our World" magazine (Dept. Ex. 1-F); April 1953 issue of "Flirt" magazine (Dept. Ex. 1-G); April 1953 issue of "Eyeful" magazine (Dept. Ex. 1-H); May 1953 issue of "Gala" magazine (Dept. Ex. 1-J); May 1953 issue of "Beauty Parade" magazine (Dept. Ex. 1-K); May 1953 issue of "Whisper" magazine (Dept. Ex. 1-L); June 1953 issue of "Frolic" magazine (Dept. Ex. 1-N) and July 1953 issue of "Night and Day" magazine (Dept. Ex. 1-P). Also received in evidence on behalf of the Solicitor were the following publications: July 1953 issue of "Whisper" magazine (Dept. Ex. 1-R, with sub-exhibits); August 1953 issue of "Wink" magazine (Dept. Ex. 1-S); August 1953 issue of "Eyeful" magazine (Dept. Ex. 1-T); August 1953 issue of "Titter" magazine (Dept. Ex. 1-U); August 1953 issue of "Flirt" magazine (Dept. Ex. 1-V, with sub-exhibits); September 1953 issue of "Whisper" magazine (Dept. Ex. 1-X, with sub-exhibits). The book involved herein, namely, the Encyclopedia, was not offered in evidence by either party.

An examination of the publications in evidence discloses that the Respondent is advertising for sale through the mails the book entitled "The Illustrated Encyclopedia of Sex." Accordingly, the Solicitor's proposed finding to the effect that the Respondent is attempting to obtain remittances of money through the mails for said book is granted.

As stated before, the Encyclopedia was not offered in evidence.
16 Nevertheless, the Solicitor's request for findings of fact embodies the contention that the effect of Respondent's advertisements, considered in

connection with the character of the publications in which they appear, is to represent that the Encyclopedia is obscene, lewd, lascivious and indecent. The legal sufficiency of the complaint on this point is put in issue by Respondent's motion to dismiss.

The Solicitor argues in support of his position that the book need not be examined since the effect of Respondent's advertisements is to promise the remitter an obscene publication and that therefore there is an absolute presumption that it is obscene.

The Solicitor cites no authority in support of such a presumption and it would appear that the use of a presumption, absolute or otherwise, in such a situation is unwarranted. It is fundamental that a presumption such as the Solicitor attempts to raise here, can only be raised where there is a rational connection between the evidence and the ultimate fact presumed. Such a connection does not exist between the representations alleged by the Solicitor, and assumed as true for the purpose of Respondent's motion, and the obscenity of the book in question. There is a presumption that all men act fairly, honestly and in good faith, Amer. Juris., Vol. 20, Sec. 229, page 223, but the question of the truthfulness of Respondent's representations is not the issue here. Also, in support of his position the Solicitor cites the decision of District Judge Yankwich of the United States District Court, Southern District of California, Eastern Division, rendered in the case of Lee A. Wallace v. Fanning, Postmaster. However, the material in
17 that case was entirely different. There, apparently a certain device disclosed by pictures thereof in Respondent's circulars, was offered for sale through the mails and from those circulars the court found the device to be obscene. However, the issue here involves a book which apparently contains numerous pages of text. It is well established that the test of obscenity of such material is the dominant effect upon those persons into whose hands such material will likely fall. Therefore, it would be necessary to examine the book in order to make a determination of whether it is obscene. The characterizations or the representations made of it in Respondent's advertisements would not necessarily

disclose its actual dominant effect.

The Solicitor also requests a finding to the effect that the Encyclopedia itself is obscene, lewd, lascivious and indecent. It is argued that the case of U.S. v. Rebhuhn (109 F. 2d 512), supports such a conclusion.

In the Rebhuhn case, an indictment was brought under a statute which, for all intents and purposes, is substantially the same as the statute herein invoked. In that case, several books were submitted to the jury under instructions covering various definitions of obscenity and the jury returned a verdict of guilty. On appeal, Judge Learned Hand of the Circuit Court of Appeals, 2nd Circuit, after having obviously exzmined the books in issue, held in effect that several of them were of a kind to which a conditional privilege attached, that is, they were not obscene per se, since, if intended for proper hands, most of them could have lawfully passed through the mails. However, the prosecution upon whom the burden of proof rested, successfully proved that the defendants had abused such conditional privilege by showing that they had indiscriminately flooded the mails with advertisements plainly designed merely to catch the prurient. The Rebhuhn case held, in effect, that a book which is deemed obscene under the well established standard of obscenity, viz., dominant effect on persons of average sex instincts, may be lawfully sold through the mails if it would serve a legitimate purpose in the hands of certain persons. However, this privilege of such a book being permitted to pass through the mails, can only be allowed under the appropriate restrictions outlined in the Rebhuhn case. Thus the offense in that case was the abuse of such conditions, it having been determined by an inspection of the involved books that they are of such restricted class. Therefore, applying the Rebhuhn case, it must be determined from an examination of the book involved, whether it comes within the conditional privilege category of being that kind of book which would be obscene in the hands of persons of average sex instincts, but which in proper hands would be legitimate, and therefore could lawfully pass through the mails under restricted conditions. After such an examination, and it be determined that a conditional privilege attaches to the

book, it must then be determined whether the distributor has abused or violated such restricted privilege. In the absence of the Encyclopedia itself, no such examination or determination is possible. If the Solicitor's position is followed, assuming that the advertisements in evidence made the representations charged in the complaint and that the Respondent is soliciting the prurient, it would result in a depature from the Rebhuhn case since it would be tantamount to holding that the invoked statute is being violated even though the book is not obscene to the said average person. In other words, the effect of the Solicitor's position is that the test of obscenity of a book may under certain conditions, be the effect on the prurient. The Rebhuhn case does not so hold and there is no authority known to me which supports such a test. Also assuming that the Encyclopedia contains discussions on various sexual matters as alleged in the complaint, it does not necessarily follow that the Encyclopedia is obscene in the hands of a person of average sexual instincts. To determine whether such a book is obscene to the average reader, it must be examined to see whether or not it portrays an accurate exposition of the relevant facts of the sexual side of life in decent language and in a manifestly serious and dis-interested spirit (U.S. v. Dennett, 39 F. 2nd 564). Again, in the absence of the Encyclopedia, no such determination is possible.

Accordingly, based upon the foregoing reasons, I conclude that the Solicitor has failed in the respects above discussed, to set forth facts sufficient to constitute a violation of the invoked statute, and to establish upon substantial evidence that the Respondent is obtaining or attempting to obtain remittances of money through the mails for an obscene, lewd, lascivious and indecent article as charged in the complaint. Accordingly, the complaint in this case is hereby dismissed.

In view of this decision it is not necessary to pass upon the other defenses interposed by the Respondent to the complaint.

/s/ Edward Canlick
Hearing Examiner

99 [Received Dec. 14, 1953]

MOTION TO DISMISS COMPLAINANT'S APPEAL
AND TO
STRIKE HIS NOTICE AND APPEAL BRIEF

Comes now the respondent by its attorney, Horace J. Donnelly, Jr., and moves the Office of Hearing Examiners and/or the Postmaster General, to physically strike and expunge from the record, the Solicitor's notice of intention to appeal and his brief on appeal filed in the above captioned proceedings, and to dismiss his alleged appeal, and for reasons therefore, states:

1. The Solicitor-complainant is proceeding under the erroneous assumption that Section 150.423 of the Department's Rules of Practice in Proceedings under the Administrative Procedure Act of 1946, applies to appeals to the Postmaster General in cases where the Hearing Officer's Initial Decision is in favor of a respondent, as in this case, whereas it is the clear meaning and intention of said Section and of Section 8 of the Administrative Procedure Act (5 U.S.C. 1007), that the procedures described therein are solely for the benefit of a respondent against whom an initial decision has been entered recommending further action by the Agency (Postmaster General) through the invoking of penalty sanctions which can only be issued by the Agency head (Postmaster General) under the statute.

2. There is no authority of law, rule or judicial precedent which permits or allows a subordinate of the Postmaster General prosecuting a proceeding of this nature, to individually challenge the findings and decision of the Examiner appointed by the Agency (Postmaster General) as his alter ego under the requirements of Section 7 of the Administrative Procedure Act (5 U.S.C. 1006) to hear and determine the issues raised by such subordinate's complaint and the respondent's answer, where evidence on behalf of both parties has been taken and a decision has been entered in favor of the respondent accompanied by an order of dismissal, for the act of the Hearing Examiner in holding against a subordinate employee of the Agency (Postmaster General) in that respect is the act of the Postmaster General.

100

3. The appeals provisions of the Department's rules and the underlying basis for such a rule provided by Section 8 of the Administrative Procedure Act, is not available to subordinates of the Agency in cases of this nature, for that any such action is in effect an adversary contest between the complaining subordinate and his supervisory official, the Postmaster General, without specific authority from the latter.

4. Over matters involving the administrative action of his subordinates in seeking to invoke the sanction provisions and penalties of a statute in an adversary proceeding such as this against a citizen, the Postmaster General has delegated basic authority to the Hearing Examiner to determine as a matter of fact and as a matter of law whether the action of his subordinate in bringing such a complaint is proper and justifiable. If the subordinate is dissatisfied with the action of the Postmaster General's authorized agent and representative, his dissatisfaction is in effect with the action of the head of his own agency -- the Postmaster General -- and he has no authority or power to proceed to seek a reversal of such action once the Agency has spoken. The appeal provisions aforesaid are provided solely as a guarantee of a citizen's right to due process of law in an administrative proceeding, if he wishes to and has need to proceed further to prevent a Hearing Examiner's Initial Decision against him from being consolidated into an order of the Agency, until he has had full opportunity to present his contentions against the decision. That substantive right does not extend to personnel under the control or control of the Agency, for if such were the case, such subordinates could carry their dissatisfaction to the
101 extreme of seeking to invoke judicial intervention against the power in the executive over such matters. This, of course, they cannot do.

5. It is furthermore respondent's position that since it is the practice and policy of the Department to require the filing of briefs on appeal with the Office of Hearing Examiners, the Hearing Examiner in this case or the Chief Hearing Examiner would have the power and authority to grant respondent's motion by rejecting and striking from the docket the brief filed by the Solicitor's assistant, and by refusing to

transmit the record to the Postmaster General. Otherwise, the Office of Hearing Examiners would be adopting a subservient position which they are not required or permitted to do by the provisions of the Administrative Procedure Act, or any other known statutory provision or judicial precedent. In effect, the present controversy is between the Solicitor's assistant and the Hearing Examiner, and this respondent, or any other respondent similarly situated, should not be required to engage in continual controversy with an official in the Office of the Solicitor, particularly when on two separate occasions the Office of Hearing Examiners has found this respondent not guilty on charges laid by that official, as the record clearly shows.

6. And for such other reasons as may be urged on the hearing hereof, if such a hearing is granted.

WHEREFORE, the premises considered, it is respectfully urged that the Solicitor's appeal be dismissed as frivolous, unwarranted and capricious, and that during the pendency of this motion, all further proceedings be stayed until the motion has been acted upon.

Respectfully submitted,

/s/ Horace J. Donnelly, Jr.
Attorney for Respondent

February 15, 1954

79 RULING ON RESPONDENT'S MOTION AND ORDER

Respondent's motion to dismiss the Solicitor's appeal and to strike his notice and appeal brief is hereby denied. The Solicitor has an equal right with respondent to appeal and to file exceptions to the hearing examiner's initial decision, which is not an agency or departmental final decision and which may be adopted, modified or rejected in its entirety by the Postmaster General or his duly delegated and authorized deputy.

March 1, 1954, is hereby fixed as the date for the filing of respondent's reply to the Solicitor's appeal from the initial decision of the hearing examiner in this case.

/s/ Charles R. Hook, Jr.
Deputy Postmaster General.

2 [Filed June 28, 1957]

POST OFFICE DEPARTMENT
WASHINGTON, D. C.

In the Matter of the Complaint That	)	
	)	
CADILLAC PUBLISHING COMPANY, INC., at	)	
New York, New York,	)	H. E. Docket No. 2/16
	)	
is conducting an unlawful enterprise through the mails in violation of 39 U.S. Code, Section 259a.	)	

FINAL DEPARTMENTAL DECISION OF THE DEPUTY POSTMASTER GENERAL UPON APPEAL

The complaint in this case alleges that Respondent conducted an enterprise in violation of Section 259a of Title 39, U.S.C.A. to obtain remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex" from persons who are readers of certain obscene, lewd, lascivious and indecent publications by means of advertisements appearing in said publications; that the said book is obscene, lewd, lascivious and indecent; and that public attention is called to the sale of said book by means of advertisements appearing in magazines such as "Famous Paris Models," "Night and Day" and many others.

Respondent's answer denied the allegations in the complaint and averred that at a previous fraud hearing the book in question was declared not obscene.

At the hearing before the Examiner, copies of the advertisements in magazines such as "Whisper", "Beauty Parade", "Frolic", "Flirt" and many other magazines referred to in the testimony were admitted in evidence, along with the magazines. The book "The Illustrated Encyclopedia of Sex" was not introduced in evidence. The Examiner dismissed the complaint because he concluded that he could not determine whether the book is obscene in dominant effect without having the book in evidence.

3

The Complainant appealed from the Examiner's decision to the Postmaster General.

Since the appeal was taken, the Respondent filed a petition in the District Court for the District of Columbia praying that the Court determine whether Complainant had a legal right to appeal from the Examiner's decision. The District Court ruled that Complainant could legally appeal from the Examiner's decision and ordered the Respondent to exhaust its remedies under the Administrative Procedure Act. From this decision the Respondent appealed to the Circuit Court of Appeals for the Third Circuit, which court sustained the decision of the District Court. The Supreme Court refused to grant a certiorari to review the case. The same circuit court in a similar proceeding in the case of Parker v. Summerfield, No. 13,437, on March 28, 1957, likewise ruled that Complainant could legally appeal from the Examiner's decision.

Respondent has since filed its brief upon appeal, and the case is now before the Postmaster General upon appeal from the Examiner's initial decision.

The Complainant in his brief upon appeal excepted in general to the Examiner's decision and specifically to the finding that it is necessary to examine the book "The Illustrated Encyclopedia of Sex" to determine whether Respondent is obtaining remittances of money through the mails for an obscene, lewd and lascivious article in violation of
4 Section 259a, Title 39, U.S.C.A. The Complainant contends that the book need not be in evidence since Respondent's advertisement promises the remitter an obscene publication. Complainant's exception upon appeal therefore poses the issues whether the Respondent is obtaining remittances of money through the mails for obscene material; whether from the contents of the advertisement in question it can be determined that the book is obscene; and whether the Respondent is giving information through the mails where, how and from whom obscene material may be obtained.

Section 259a of Title 39, U.S.C.A. upon which the complaint is based reads as follows:

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may --

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe...."

It is to be noted that "Upon evidence satisfactory to the Postmaster General" he may issue an "Unlawful" order to return Respondent's mail to the sender (1) in case Respondent is obtaining money for ob-
5 scene material, and (2) if the Respondent is giving information where obscene material may be obtained. The first charge must be considered in the light of the testimony, the advertisement itself and the magazines in which it appeared.

An examination of the advertisement discloses that it contains a printed heading "Lasting mutual satisfaction for all couples with these brand new illustrated SEX FACTS" and "GIANT SIZE BOOK packed with HUNDREDS OF PICTURES many in lifelike color". A drawing of a book in the advertisement contains a title, "The ILLUSTRATED Encyclopedia of Sex by Dr. A. Willy, Dr. L. Vander, Dr. O. Fisher and other authorities". In smaller print the book is described, "Written and

illustrated by the most noted physicians and medical artists on sexual enlightenment. SEE HOW and READ HOW by means of hundreds of unusual realistic pictures (many in true-to-life color), plus detailed step-by-step instructions written frankly and bluntly . . . Clearly see and understand how sex organs of the male and female function in action. Many troubled men and women have found a new, thrilling, joyful married sex life and new confidence in themselves by reading . . ." This statement is followed by, "PARTIAL LIST OF 61 BIG CHAPTERS EACH A 'BOOK' IN ITSELF". Then the advertisement lists the title of 29 chapters out of 61 contained in the book. Some of these titles are, "Techniques that bring supreme joy to the sex act for male and female", "How woman's climax is brought about", "Showing how sexual desire is aroused in woman", "Techniques of first sex act or bridal night", "Male and female reaching climax at same time", and others of a similar
6 nature. The advertisement concludes with a statement that the book contains illustrations, alive with color pictures, such as "See the Male Sex Organs (inside and out)" and "Showing how erection and climax in male occurs". In some instances pictures of semi-nude young women in provocative poses appear next to the advertisement in the aforementioned magazines.

The advertisement in question appeared in magazines such as "Frolic", "Our World", "Flirt", "Eyeful", "Gals", "Whisper" and others of a similar type. An examination of all of the magazines in evidence in which the advertisement appeared leads to the conclusion that the texts are dominated with sexy stories and many obscene illustrations of semi-nude young women in provocative poses and therefore can be classified as "sexy" magazines.

A witness for the Respondent testified that there was a variation in the advertisements depending upon the censorship of the magazine itself. In conservative magazines the format of the advertisement is reduced to general statements such as, "Gives you the most helpful, authentic guidance on sex problems." However, in the "sexy" magazines the advertisement contains the full description and titles of the

chapters as outlined above. There is evidence of record that some of these magazines were received by the inspectors through the mails.

At this point in considering the issue upon appeal it must be remembered that the advertisement alleges that it is a scientific book on sex; that the advertisement was placed in many so-called "sexy" magazines; and that the book "The Illustrated Encyclopedia of Sex" is not in evidence.

7 The advertisement states that "The ILLUSTRATED Encyclopedia of SEX by Dr. A. Willy, Dr. L. Vander, Dr. O. Fisher . . . ." is "written and illustrated by the most noted physicians and medical artists on sexual enlightenment . . . ." Our appellate couts have stated that publications about art and science may pass through the mails if the dominant effect of the book is not obscene. However, the court in the case of United States v. Rebhuhn, et al., 109 Fed. (2d) 512, stated "In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications, and that in the trial of an indictment the prosecution must prove that the accused has abused a conditional privilege, which the law gives him . . . . However, in the case at bar, the prosecution succeeded upon that issue, when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit." In the instant case the Respondent violated the conditional privilege accorded a scientific publication when it flooded the "sexy" magazines referred to herein with advertisements of the book in question.

The book not being in evidence it must be determined, under the aforementioned conditions, whether the Respondent is obtaining remittances of money through the mails for an obscene book from the advertisement itself. The title "The Illustrated Encyclopedia of Sex", when advertised in a medical journal, could mean that it contains scientific information, but when advertised in a "sexy" magazine it most likely would connote a book which describes sex stimulating writings and illustrations.

The Respondent also arranged the titles and descriptions of the
8 29 chapters in the advertisements in the "sexy" magazines in words and phrases relating to sex and sexual intercourse in order to give the impression that each chapter as described is obscene. A title "Techniques that bring supreme joy to the sex act for male and female" would mean to the prurient that the chapter contains descriptions of sexual intercourse. A chapter entitled "Male and female reaching climax at same time" would mean to the prurient another description of sexual intercourse. A chapter in a book describing what is stated in the aforementioned titles would be obscene in dominant effect when read by the lewd and lascivious.

Likewise the title of the colored pictures in the advertisement "Complete Color Picture Story of Women's Sex Organs (inside and out)", and thirteen other similar titles of lifelike colored pictures of male and female organs, published as advertised would make the pictures obscene, lewd and lascivious in the hands of the prurient. In the case of Lynch v. United States, 265 Fed. 162, the defendant was charged with sending through the mails a group of copies of photographs of nude women which he contended were copies of works of art. The court sustained the conviction and stated "Under the evidence it is too plain for controversy that these pictures, whether culled from so-called works of art or elsewhere, were selected, sold and distributed in large quantities without reference to art or art studies but wholly for the purpose of profitably pandering to the lewd and lascivious." The court stated that such a grouping of pictures was pandering to the lews and lascivious and the pictures so grouped were considered obscene.

9 Our appellate courts have declared books obscene when their dominant effect arouses and stimulates the sex senses of the average male persons; when it violates the common and well-recognized community standards of decency, morality and modesty. The description of the book contained in the advertisement in the instant case is contrary to these established standards. It is therefore found that the Respondent is obtaining remittances of money through the mails for a book entitled

"The Illustrated Encyclopedia of Sex" which is obscene, lewd and lascivious.

The Examiner also failed to consider the portion of the Act that Respondent advertised and gave information through the mails where, how and from whom obscene, lewd and lascivious material may be obtained. This charge is not specifically set out in the complaint in words of the Act cited above, but it is sufficiently contained in the complaint to charge the Respondent with violating said portion of the Act.

Section 1004(a), Title 5, U.S.C. of the Administrative Procedure Act, under which the instant proceedings were conducted states "Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted . . . . "

The first paragraph in the complaint states in general that Respondent is conducting an enterprise through the mails in violation of the aforesaid section. The paragraph designated (2) in the complaint alleges "That the attention of such persons to the sale of said book is attracted by advertisements thereof appearing in publications entitled "Whisper", "Frolic" and many others. The advertisements in evidence give Respondent's address where "The Illustrated Encyclopedia of Sex" may be obtained. A postal inspector testified that he received some of the magazines containing the advertisement through the mails. These allegations in the complaint are sufficient to make up the charge that Respondent mailed or caused to be mailed information where, how and from whom obscene material may be obtained.

Furthermore, Respondent was accorded a hearing upon said charge in conformity with the provisions of the Administration Procedure Act, cited above. When this last stated charge is alleged in a complaint it is not necessary that the material advertised be in evidence.

In the case of Hornick v. United States, 219 Fed. (2d), 120, the Respondent was charged with depositing in the mails information where, how and from whom obscene material may be obtained and the material

advertised not being in evidence the court stated "We have no doubt that the whole tone of both of these advertisements gives the leer that promises the customer some obscene pictures . . . . We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape. . . the gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter." In the instant case the book was not in evidence but the offense of giving information through the mails is sufficiently established from the advertisement itself and
11 the testimony of a postal inspector that he received magazines containing the advertisement through the mails.

Respondent contends that the issue whether the book is obscene is res adjudicata because the book in question was declared not obscene in a fraud proceedings instituted by the Post Office Department under Section 259, Title 39, U.S.C.A. The Post Office Department is not bound by the rule of res adjudicata in any agency proceedings. United Mine Workers v. National Labor Relations Board, 234 Fed. (2d) 565.

An examination of the entire records leads to the conclusion that Respondent is obtaining remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex" which is found to be obscene from the advertisement; that Respondent is giving information through the mails as to where, how and from whom obscene material may be obtained; that there is evidence satisfactory to the Postmaster General to issue an "Unlawful" order against Respondent's mail.

The Examiner's findings and conclusions of law are therefore set aside and it is found that Respondent is obtaining remittances of money through the mails for an obscene book entitled "The Illustrated Encyclopedia of Sex" as advertised and that Respondent is giving information as to where, how and from whom obscene material may be

obtained. Complainant's exceptions are allowed and his appeal is sustained. An "Unlawful" order should issue in this case.

(Signed) Maurice H. Stans

Deputy Postmaster General

12

POST OFFICE DEPARTMENT
WASHINGTON

ORDER NO. 56390 June 28, 1957

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by: Cadillac Publishing Co., Inc., at New York, N. Y.,

in violation of Section 259a of Title 39, United States Code, which prohibits the obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and the depositing, or causing to be deposited, in the mails information as to where, how or from whom the same may be obtained, said evidence being a part of the record in the case identified below by docket number;

Now, therefore, by virtue of the authority vested in the Postmaster General by the provision of said law and by him delegated to me by orders of the Deputy Postmaster General, No. 55628, dated May 17, 1954, and No. 56214, dated October 10, 1956, you are hereby forbidden to pay any postal money order drawn to the order of said names or addresses, and you are directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not

available, that repayment may be effected by means of a duplicate order under regulations of the Department.

You are hereby instructed to return all letters, whether registered or not, and all other mail matter which shall arrive at your office directed to the said names or addresses (except letters or mail matter which can be identified on the face of the envelope or wrapper thereof as not being relative to this enterprise, such as letters from public utilities, Federal, State or Municipal agencies, doctors, lawyers, churches, or magazines and newspaper) to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word "Unlawful" plainly written or stamped upon the outside of such letters or other mail matter. Provided, however, that where there is nothing to indicate who the senders are, such letters or other mail matter are to be sent to the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

(H. E. Docket No. 2/16)

To the Postmaster,
New York, N. Y.

(Signed) Maurice H. Stans
Deputy Postmaster General

POD Form 1274
Mar. 1957

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 11 1957
Joseph W. Stewart
CLERK

No. 14,205

CADILLAC PUBLISHING COMPANY, INC.,
Appellant

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HORACE J. DONNELLY, JR.
American Security &
Trust Building
Washington 5, D. C.
Attorney for Appellant

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

STATEMENT OF QUESTIONS PRESENTED

The questions are:

1. Whether the action of the Deputy Postmaster General in issuing an order to Postmasters stopping the delivery of all mail addressed to appellant (including mail matter in no way related to the enterprise complained against), refusing the payment of money orders payable to it, and ordering the return of such mail matter to senders marked "unlawful", under the alleged authority 39 USC 259(a), was contrary to, and violative of, the constitutional guarantees of freedom of expression and the press under the First Amendment to the Constitution; the right to Due Process of Law under the Fifth Amendment and under the Administrative Procedure Act of 1946; was legislative in nature and quality; was not within properly delegated jurisdiction; was not authorized by law; was an erroneous interpretation of the statute in question and the Administrative Procedure Act, without substantial evidence to support such action, and was otherwise arbitrary, capricious and unwarranted.

2. Whether the statute, as interpreted and applied, is unconstitutional as being without standards, and therefore void for vagueness.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND RULES INVOLVED	6
STATEMENT OF POINTS	9
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I. The "unlawful" order issued by appellees is not within jurisdiction delegated to the agency and is not authorized by law but is based upon an erroneous interpretation of 39 USC 259(a); is without substantial evidence to support it and is therefore an arbitrary, capricious and unwarranted action	11
II. Grave constitutional questions have arisen by the action in stopping appellant's mail	18
III. The procedures and organization resulting in the Deputy Postmaster General's action failed to accord due process of law and are contrary to the provisions of the Administrative Procedure Act	23
IV. Appellees are estopped from issuing sanctions against a mail user after there has been a previous and final agency adjudication in favor of the same mail user based upon the same subject matter	26
CONCLUSION	28
SUPPLEMENTAL MATTER	S-1

TABLE OF CASES

Agnew v. Federal Reserve System, 152 F. 2d 785	28
Alberty v. United States, 159 F. 2d 278	20
American School of Magnetic Healing v. McAnnulty, 187 U.S. 106	15
Briehl v. Dulles, ___ F. 2d ___.	23
Bridges v. Wixon, 326 U.S. 135	24
Brown v. Brown, 122 F. 2d 219	26
Burstyn v. Wilson, 343 U.S. 495	21
Cadillac Publishing Co. v. Summerfield, 227 F. 2d 29	5

INDEX (Cont'd.)

	Page
Chapman v. Sheridan-Wyoming Co., 338 U.S. 621	24
Connelly v. General Construction Co., 269 U.S. 384	21
Consumers Union v. Walker, 145 F. 2d 33	15, 19
Cudahy Packing Co. v. Holland, 315 U.S. 357	23
Dequesne Warehouse Co. v. Railroad Retirement Board, 148 F. 2d 473	28
Edelman v. California, 344 U.S. 357	21
Ellison v. Frank, 245 F. 2d 837	25
Embassy Dairy v. Camalier, 211 F. 2d 41	2
France v. United States, 164 U.S. 676	20
Grosjean v. American Press, 297 U.S. 233	21
Hannegan v. Esquire, 327 U.S. 146	15
Horrick v. United States, 219 F. 2d 120	17
Hotch v. United States, 212 F. 2d 280	24
Jeffries v. Olesen, 121 F. Supp. 463	24
Kingsley Books v. Brown, 354 U.S. 436	19
Krug v. Lincoln National Insurance Co., 245 F. 2d 848	23
In re Lambert, 203 F. 2d 607	20
Lanzetta v. New Jersey, 306 U.S. 45	21
Lee v. Federal Trade Commission, 113 F. 2d 583	27
Lee v. Fleming, 158 F. 2d 984	24
McBoyle v. United States, 283 U.S. 25	21
Meyer v. Nebraska, 262 U.S. 390	21
Minneapolis Honeywell Co. v. Federal Trade Commission, 191 F. 2d 786	25
Morgan v. United States, 298 U.S. 468	25
Nears v. Minnesota, 283 U.S. 697	19
Oakley v. Summerfield, 231 F. 2d 775	16
Olesen v. Stanard, 227 F. 2d 785	16
Parker v. Summerfield, (#13,437 - U.S. Ct. App. D.C.)	5, 6
Parmalee v. United States, 113 F. 2d 729	14
Poulos v. New Hampshire, 345 U.S. 395	21
Rhodes Pharmacal Co. v. Federal Trade Commission, 208 F. 2d 382	12
Roth v. United States, 354 U.S. 476	14, 15, 19, 22
Savoretti v. Small, 244 F. 2d 292	23
Screws v. United States, 325 U.S. 91	21
Shreveport Engraving Co. v. United States, 143 F. 2d 222	23

INDEX (Cont'd.)

	Page
Southern Pac. R. Co. v. United States, 168 U.S. 1	26
Stanard v. Olesen, 98 L. ed. 1151	16, 17, 21
Sunshine Book Co. v. Summerfield #1; 221 F. 2d 45	16, 18
Sunshine Book Co. v. Summerfield #2; ___ F. 2d ___.	17, 19, 26
Thomas v. Collins, 323 U.S. 516	21, 22
Thornhill v. Alabama, 310 U.S. 88	16
Tourlanes Publishing Co. v. Summerfield, 231 F. 2d 773	14, 16
Union Pacific Railroad Co. v. United States, 313 U.S. 450	17
United States v. L. Cohen Grocery Co., 225 U.S. 81	21
United States v. Cardiff, 344 U.S. 174	20, 21
United States v. Dennett, 39 F. 2d 564	14
United States v. Flinn, 127 F. Supp. 158	24
United States v. Five Gambling Devices, 346 U.S. 441	20, 21
United States v. Halseth, 342 U.S. 277	20
United States v. Levine, 83 F. 2d 156	14
United States v. Munsingwear, Inc., 340 U.S. 36	26
United States v. One Book "Ulysses", 72 F. 2d 705	14
United States v. Rumely, 345 U. S. 41	23
United States ex rel Accardi v. Shaughnessy, 347 U.S. 26	24
United States v. Weitzell, 246 U.S. 533	21
United States v. Willard Tablet Co., 141 F. 2d 141	27
Universal Camera Corp. v. NLRB, 340 U.S. 474	17, 25
Walker v. Popenoe, 149 F. 2d 511	14
Winters v. New York, 333 U.S. 507	21
Wong Yang Sung v. McGrath, 339 U.S. 33	25
Woods v. Benson Hotel Corp., 75 F. Supp. 743	24

Statutes

Administrative Procedure Act, 5 U.S.C. 1001 et seq.	7, 9, 25, 26
Federal Register Act, 44 U.S.C. 305	9
Postal Obscenity Act, 39 U.S.Code 259(a)	2, 3, 6, 11, 23
28 USCA 1291	~~21~~ 2

Other References

Obscenity and the Mails - Law and Contemporary Problems - Duke University School of Law, Vol. XX, No. 4 at p. 608 et seq.	15
42 Am. Jur., Public Administrative Law	23
Post Office Department Rules of Practice	4, 6, 11, 23, 24

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

October Term, 1957

No. 14,205

CADILLAC PUBLISHING COMPANY, INC.,
A Corporation,

Appellant

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an order of the District Court dated October 9th, 1957, in which the motion of plaintiff Cadillac Publishing Company for summary judgment on the pleadings was denied and the cross-motion of defendants Arthur E. Summerfield, Postmaster General and Maurice H. Stans, Deputy Postmaster General, was granted and the complaint for review under the Administrative Procedure Act of 1946, as amended, of an Agency action, and for injunctive relief against an "unlawful"

order issued by defendants allegedly under the authority of the mail obscenity statute (Title 39 U. S. C. 259(a)), -- was dismissed. Plaintiff's motion for injunction pendente lite, was thereby, in effect, also denied. Jurisdiction is conferred on this court by the provisions of Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

According to the complaint, (Appellant's App. 2) the material allegations of which were admitted by appellees' answer and dismissal motion,[1] appellant is a reputable publishing company engaged in the publication and distribution of works of numerous authors on a variety of subjects, some of which are advertised and sold through the United States mails, including among others a work entitled "The Illustrated Encyclopedia of Sex",[2] -- the only title involved in appellees' action. Appellant has a large and substantial investment and interest in the aforesaid publishing business, in which appellant's right to use the facilities of the Post Office Department, is a necessary, important and indispensable part.

Under date of June 28, 1957, appellee Maurice H. Stans issued Post Office Department Order No. 56390 directing the Postmaster at New York, New York to return (with certain minor exceptions) all letters and all other mail matter arriving at the latter's office and directed to the Cadillac Publishing Company, Inc., to Postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof with the word "unlawful" endorsed thereon and did further forbid said Postmasters to pay any postal money orders drawn to the order of said Cadillac Publishing Company, Inc. (Appellant's App. 149).

---

1 See Embassy Dairy v. Camalier, 93 U.S. App. D.C. 364; 211 F. 2d 41, 43.

2 No copy of the book, "Illustrated Encyclopedia of Sex", published and distributed by appellant, was offered in evidence in the administrative proceeding. (Appellant's App. 141), it being conceded and admitted by appellees that the work is not obscene (Appellant's App. 50).

Appellant was twice compelled to answer charges brought against it before the Office of Hearing Examiners of the Post Office Department by appellees' subordinates -- (the Solicitor[3] of that Department and his assistants) -- involving the same subject matter, and in each case appellant successfully defended itself against such charges. In the first case (Office of Hearing Examiners Docket No. 1/244), the Solicitor's complaint was dismissed on August 21, 1952, by the Initial Decision of the Post Office Department's Hearing Examiner. The subject matter of the complaint was appellant's advertising and sale through the mails of an authentic and valid treatise authored by professional medical authorities, entitled "The Illustrated Encyclopedia of Sex." The charge made by the Solicitor against such activity was, in effect, that because the book was not obscene, appellant was obtaining remittances through the mails for same by means of false and fraudulent pretenses, representations and promises, in violation of Sections 3929 and 4041 of the Revised Statutes (39 USC 259 and 732). The Hearing Examiner's Initial Decision, under the Rules of Practice promulgated by the Postmaster General for that office, became final and no further action was taken.

Thereafter, under date of February 24, 1953, the Acting Solicitor for the Post Office Department, instituted a new action (H.E. Docket 2/16) before the Office of Hearing Examiners for the Post Office Department, by filing a complaint charging appellant with conducting through the mails an unlawful enterprise in violation of the obscenity provisions of 39 U.S. Code 259(a), by obtaining remittances through the mails for an obscene book, namely, the aforementioned work, "The Illustrated Encyclopedia of Sex".

Appellant filed an answer denying said charges and setting up various affirmative defenses, including res ajudicata (Appellant's App. 73).

---

3 Now known as General Counsel

On June 16, 1953, a hearing was held before Edward Carlick, Esq., a Hearing Examiner assigned to hear the case by order of the Chief Hearing Examiner for the Post Office Department, at which the sole evidence offered in support of the allegations of the complaint, consisted of issues published in 1953, of ten magazines containing appellant's advertisement of the book. After certain interlocutory proceedings, the said Hearing Examiner on October 29, 1953, issued his Initial Decision (Appellant's App. 133) dismissing the complaint for failure of the complainant-Solicitor to set forth facts sufficient to constitute a violation of the statute sought to be invoked.

Under date of November 5, 1953, the Solicitor for the Post Office Department filed with the Office of Hearing Examiners a notice of intention to appeal to the Postmaster General from the Hearing Examiner's decision, and under date of November 27, 1953, filed a brief on appeal. Appellant thereupon filed a motion to dismiss complainant's appeal and to strike his notice of intention to appeal and his appeal brief, (Appellant's App. 138) on the grounds that the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, dated November 6, 1952 (Appellant's App. 9), and under which the proceedings up to that time had allegedly been conducted, did not provide for an appeal by the Solicitor from an adverse decision of the Office of Hearing Examiners. Subsequently, appellant was served with a paper dated February 15, 1954, (Appellant's App. 140) signed by a Deputy Postmaster General, denying respondent's motion. At or about the same time, Plaintiff was furnished with a document headed "Rules of Practice in Proceedings Under the Administrative Procedure Act . . . Amended Effective January 20, 1954", (Appellant's App. 11) in which an appeal procedure was attempted to be established permitting the Solicitor to appeal to a Deputy Postmaster General from a Hearing Examiner's decision against the Solicitor's complaint, which amended rules were never properly promulgated and have never been published in the Federal

Register.[4] Attached to said document was a copy of an order of the Postmaster General, delegating all of his quasi-judicial authority to issue "fraud" and "unlawful" orders to said Deputy Postmaster General. Subsequent to the receipt of such order and new rules as aforesaid, appellant, at all times reserving its objection to such proceeding as a matter of law, advised said Solicitor that notwithstanding the Hearing Examiner's decision in its favor, in the interest of cooperation with a government agency it would voluntarily eliminate the cause of the Solicitor's original complaint in the action. Thereafter, under date of April 22, 1954 (Appellant's App. 16) the Solicitor for the Post Office Department notified appellant that such disposition was not satisfactory and submitted an affidavit for execution by appellant, in which, as demanded by the said Solicitor, appellant would be required to discontinue the sale of the book "Illustrated Encyclopedia of Sex" except under terms dictated by the said Solicitor, whereby sales would be made only to professional readers or on the prescription of a physician. Appellant rejected such demands.

Under date of April 12, 1956, and after appellant's petition for judicial relief had been denied on the grounds of failure to exhaust its administrative remedy (Cadillac Publishing Co. v. Summerfield, #12, 506 in this court; 97 U.S. App. D.C. 14; 227 F. 2d 29, certiorari denied 350 U.S. 901), appellant under objection, but pursuant to the order of the Deputy Postmaster General, did file in the Office of Hearing Examiners of the Post Office Department its brief in answer to the Assistant Solicitor's brief on appeal to the Postmaster General from the Initial Decision of the Hearing Examiner dismissing the complaint after hearing, as aforesaid. Said appeal was thereupon under date of June 28, 1957, adjudicated by the appellee, Deputy Postmaster General Maurice H. Stans (Appellant's App. 141) against appellant, and against the findings

---

4 See admission answer of appellee Summerfield to this Court's query on this point, in Parker v. Summerfield, #13,437, set out in the supplement hereto.

and initial decision of the Hearing Examiner, upon a new and different specification of charges not contained in the original complaint. The "unlawful" order stopping delivery of appellant's mail was concurrently issued. (Appellant's App. 149)

On July 3, 1957, appellant filed in the District Court (Appellant's App. 2), its complaint for review of, and injunctive relief against, the aforesaid action. Appellees filed their answer on August 30, 1957, (Appellant's App. 17), after appellant had filed its motion for injunction pendente lite (Appellant's App. 19), the hearing of which was postponed until October 3d, 1957, because of not being reached when originally set for hearing. Appellant on September 26, 1957 filed its motion for summary judgment (Appellant's App. 32) and appellees filed their cross-motion (Appellant's App. 34) which motions were heard on October 3d, 1957, (Appellant's App. 35 et seq)[5] followed by the District Judge's opinion on October 4, 1957 (Appellant's App. 66 at et seq) and the court's order of October 9, 1957 (Appellant's App. 69) dismissing the complaint.

This appeal followed.

STATUTES INVOLVED

1. The pertinent portions of the Act of August 16, 1950 c. 721, 64 Stat 451; Sec. 259a, Title 39, U.S.C., under which the Acting Solicitor filed his complaint against appellant with the Office of Hearing Examiners for the Post Office Department, and under the alleged authority of which, the Deputy Postmaster General acted, provide:

---

5 At that time the record of the administrative proceeding in the Post Office Department, including the Transcript of Testimony, was put in evidence. The pertinent parts thereof are reproduced in Appellant's Appendix (pp. 71-132) herein. Appellant's profer of the record of the prior proceeding, was rejected. The two sets of Rules of Practice in dispute here, appear in full in the record in Parker v. Summerfield, #13,437 in this court and are reproduced in the Joint appendix therein. The pertinent parts are excerpted in the Appendix herein (pp. 9-15).

"Exclusion from the mails of obscene, lewd, etc., articles, matters, devices, things or substances

"Upon evidence satisfactory to the Postmaster General that any * * * corporation * * * is obtaining, or attempting to obtain, remittances of money or property * * * through the mails for any obscene * * * matter * * * or is depositing or is causing to be deposited in the United States mails, information as to where, how, or from whom the same may be obtained, the Postmaster General may --

"(a) instruct postmasters at any post office * * * to return all matter (addressed to such corporation) to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof * * *, and

"(b) forbid the payment by any postmaster to any such * * * corporation * * * of any money order or postal note drawn to the order of such * * * corporation * * *."

2. The pertinent portions of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, as amended (5 U.S.C.A. 1001, et seq.), are as follows:

"Sec. 3 (5 U.S.C.A. 1002). Publication of information, rules, opinions, orders and public records.

"(a) Every agency shall separately state and currently publish in the Federal Register * * * (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal procedures available * * * and (3) substantive rules adopted as authorized by law * * *. No person shall in any manner be required to resort to organization or procedure not so published."

"Sec. 4 (5 U.S.C.A. 1003). Rule making.

"(a) General notice of proposed rule making shall be published in the Federal Register * * *."

"Sec. 5 (5 U.S.C.A. 1004). Adjudications.

"(c) * * * No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a

factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 of this title except as witness or counsel in public proceedings. * * *. "

"Sec. 8 (5 U.S.C.A. 1007). Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

"(a) In cases in which the agency has not presided at the reception of evidence, the officer who presided * * * shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. * * *. "

"Sec. 9 (5 U.S.C. 1008) Imposition of Sanctions;

"In the exercise of any power or authority -- (a) no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law. "

"Sec. 10 (5 U.S.C.A. 1009). Judicial review of agency action.

"Except so far as (1) statutes preclude judicial review or (2) the agency action is by law committed to agency discretion

"(a) Any person suffering legal wrong because of any agency action, * * *, shall be entitled to judicial review thereof.

"(c) * * * every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * *
(B) hold unlawful and set aside agency action, * * * found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) contrary to constitutional right, power, privilege,

> or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence; * * *."

3. The pertinent portions of the Federal Register Act, June 26, 1935, c. 417, Sec. 5, 49 Stat. 501 (44 U.S.C.A. 305), provide:

> "There shall be published in the Federal Register * * * such documents as may be required so to be published by Act of Congress. * * *."

4. The pertinent portions of the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, dated November 6, 1952, which were the Rules of Practice in existence at the time of the Post Office Department's complaint against appellant was brought, and which were in effect at the time the Hearing Examiner heard the case and rendered his decision, are set forth in the appendix hereto (Appellant's App. 9 et seq).

5. The pertinent portions of the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, amended January 20, 1954, are set forth in the appendix hereto (Appellant's App. 11 et seq).

STATEMENT OF POINTS

1. The complaint filed in the District Court states a cause of action for declaratory and injunctive relief and the granting of appellees' motion to dismiss same, was an error of law.

2. The failure of the District Court to grant the relief sought on a comprehensive review of the Agency action required by the Administrative Procedure Act, was an error of law.

SUMMARY OF ARGUMENT

1. Where the action of appellees in seizing mail matter is not within jurisdiction delegated to the agency and is not authorized by law, but is based upon an erroneous interpretation of the statute sought to be invoked and lacks substantial evidence to support it, such action is therefore arbitrary, capricious, unwarranted and otherwise not in accordance with law.

2. Grave constitutional questions are raised by an arbitrarily issued mail-stoppage order, which make the statute, as interpreted and applied, unconstitutional.

3. The procedures and organization resulting in appellees' action, failed to accord due process of law and are contrary to the provisions of the Administrative Procedure Act.

4. Appellees are estopped from issuing sanctions against a mail-user, after there has been a previous and final Agency adjudication in favor of the same mail-user based upon the same subject matter.

ARGUMENT

I. THE "UNLAWFUL" ORDER ISSUED BY APPELLEES IS NOT WITHIN JURISDICTION DELEGATED TO THE AGENCY AND IS NOT AUTHORIZED BY LAW BUT IS BASED UPON AN ERRONEOUS INTERPRETATION OF 39 USC 259(a); IS WITHOUT SUBSTANTIAL EVIDENCE TO SUPPORT IT AND IS THEREFORE AN ARBITRARY, CAPRICIOUS AND UNWARRANTED ACTION.

The statute under which the Deputy Postmaster General issued the mail-stoppage order against appellant (39 USC 259(a)) bears the heading in the U.S. Code: "Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things or substances". The complaint lodged against appellant before a Hearing Examiner for the Post Office Department (Appellant's App. 71) under the Rules of Practice then in effect (Appellant's App. 9) alleged only that appellant's book "The Illustrated Encyclopedia of Sex" is obscene, lewd, and lascivious in the hands of persons who buy same in response to advertisements appearing in certain named magazines, and in the hands of minors who may purchase it through the mails in response to said advertisements, and that appellant has been obtaining remittances of money through the mails for the book from persons who are readers of certain obscene, lewd, lascivious and indecent publications, namely certain 1953 issues of the magazines named in the complaint -- in violation of 39 US Code 259(a).

At the hearing held before a Hearing Examiner of the Post Office Department, the only evidence offered by the attorney supporting the complaint consisted of issues of ten magazines (Appellant's App. 89 et seq) most of which were purchased on newsstands by the Post Office Inspector, and several were received by mail (Appellant's App. 90). No evidence was offered as to who did the mailing. A number of the magazines bore the inscription "Entered as second-class mail matter". Even though no evidence was offered in support of the allegations

aforesaid, yet Respondent therein (Appellant here) made an offer to prove (Appellant's App. 82) by depositions that the people who answered respondent's advertisement in said magazines were not minors, and that in the hands of such persons the book was not obscene (Appellant's App. 115). This offer was rejected.[6] Respondent also proved (Appellant's App. 109, 110 - 113) that it is the policy of the Cadillac Publishing Company not to fill any orders for the book for persons under twenty-one years of age, and such policy was carried out. It was also proved that the respondent distributed other books such as "The Complete Home Decorator", "Mathematics Made Simple", "Creative Psychology", and "How Shall I Tell My Child", which are a few of the titles of books distributed by respondent (Appellant's App. 112). It was also proved by respondent that the book "Illustrated Encyclopedia of Sex" was advertised in many periodicals such as daily newspapers, professional journals and others. (Appellant's App. 117). The attorney supporting the complaint declined to offer in evidence the book entitled "The Illustrated Encyclopedia of Sex" (Appellant's App. 103). The Hearing Examiner took official notice of a prior proceeding (H. E. Docket 1/244) involving the same book and the same respondent (Appellant's App. 105-106).[7]

The Hearing Examiner subsequently found (Appellant's App. 137) that the Solicitor failed: "To set forth facts sufficient to constitute a violation of the invoked statute and to establish upon substantial evidence that the respondent is obtaining or attempting to obtain remittances of money through the mails for an obscene, lewd, lascivious, and indecent article as charged in the complaint", and that accordingly: — "the complaint in this case is hereby dismissed".

---

6 It has been held that a party in an administrative proceeding is entitled to produce evidence of consumer reaction. Rhodes Pharmacal Co. v. Federal Trade Commission (CCA 7th) 208 F. 2d 382, modified on other grounds 348 U.S. 940.

7 The Hearing Examiner's Initial Decision in that case is reproduced in the supplement hereto.

However, upon the Solicitor's appeal directed to the Postmaster General from this decision (Appellant's challenge to such procedure as a matter of law being set forth in Argument No. III herein), the Deputy Postmaster General reversed this finding and decision and held (Appellant's App. 148) "that respondent is giving information through the mails as to where, how, and from whom obscene material may be obtained", and that "there is evidence satisfactory to the Postmaster General[8] to issue an 'unlawful' order against respondent's mail". (emphasis supplied)

In so concluding and in adding this new charge which was not alleged in the complaint the Deputy Postmaster General committed a definite error of law in that the book which was not in evidence was admittedly not obscene. Therefore there could be no valid finding by him that appellant had been obtaining remittances for an obscene article as originally charged. Secondly, he erred because the new charge and finding (furnishing information, etc.) does not satisfy the second provision of the statute which provides that "upon evidence satisfactory to the Postmaster General that any -- corporation -- is depositing or is causing to be deposited in the United States mails, information as to where, how, or from whom the same (any obscene, etc. article) may be obtained". (Emphasis and matter in parenthesis supplied). There was no evidence whatsoever of record showing that appellant had anything to do with the publication and distribution of the ten magazines, several issues of which were introduced into evidence at the hearing, much less having deposited same in the mails, which is the gravamen of the offense against that part of the statute upon which the Deputy Postmaster General, sua sponte and ex parte, relied.

Therefore, in the following respects, the Deputy Postmaster General in acting as he did, and the court below in sustaining his

---

8 It should be noted that while the Solicitor's Appeal was directed to the Postmaster General, the official named in the Rules of Practice then in effect (Appellant's App. 10) yet the decision thereon was not made as stated, by that official upon evidence satisfactory to him.

action, not only misinterpreted the statute, but also misapplied it without having any substantial evidence to support such a decision:[9]

1. It is a well established principle of law that when arriving at a determination as to whether or not a book is obscene, the whole matter must be considered and not isolated portions taken out of context. Roth v. United States, 354 U.S. 476; 1 L. ed 2d 1498, 1510; citing Walker v. Popenoe, 80 U.S. App. D.C. 129; 149 F. 2d 511; Parmalee v. United States, 72 App. D.C. 203; 113 F. 2d 729, 730; United States v. Levine, (CCA 2d) 83 F. 2d 156 and many other cases in point.

2. It is also the well established rule of law that the way in which to determine whether something is obscene is to examine it, United States v. Dennett, (CCA 2d) 39 F. 2d 564 (1930); United States v. Levine, supra,; United States v. One Book Entitled Ulysses, (CCA 2d), 72 F. 2d 705.[10]

3. Admittedly being without any knowledge as to the contents of the book "Illustrated Encyclopedia of Sex", and in the face of the determination in prior proceedings whereby the book was found not to be obscene, and is even now so considered, he arbitrarily and without any legislative or any other standard to guide him, established a new category which he called "sexy" in classifying certain magazines, and then grounded his decision on the theory that an advertisement of an authentic, scientific and non-obscene treatise on sexual psychology appearing in a magazine meeting

---

9 Of particular interest is the Deputy Postmaster General's theory of the issues namely: "the advertisement alleges that it is a scientific book on sex; that the advertisement was placed in many so-called 'sexy' magazines; and that the book 'The Illustrated Encyclopedia of Sex' is not in evidence" (Appellant's App. 145), together with his comment: "The title 'The Illustrated Encyclopedia of Sex' when advertised in a medical journal could mean that it contained scientific information, but when advertised in a 'sexy' magazine it most likely would connote a book which described sex stimulating writings and illustrations". (Emphasis supplied).

10 Attention is invited to the government's acknowledgment, and acceptance of this principle as stated on Page 14 of the Postmaster General's brief in Tourlanes Publishing Company v. Summerfield, (Nos. 12,884; 12,969; 13,022) 98 Appeals D.C. 20; 231 F. 2d 773.

his own opinion as to what is "sexy", -- was an advertisement of an obscene article in violation of the statute.

In Hannegan v. Esquire, 327 U.S. 146, it was held that officials of the Post Office Department have no power to prescribe standards for the literature or art which a publication disseminates. It has also long been established that unless the question may be reduced to one of fact, as distinguished from mere opinion, the statutes administered by the Postmaster General cannot be invoked for the purpose of stopping the delivery of mail matter. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 106. See also: Consumers Union v. Walker, 70 App. D.C. 229; 145 F. 2d 33 wherein this court stated:

> " -- while it is the duty of courts, whenever they can, to interpret statutes in such a manner as to avoid doubt of constitutionality, there is also a duty to avoid absurdity or injustice" --

the Court having before it for decision another case involving an erroneous interpretation of the obscenity statute by officials who have now interpreted the obscenity statute here involved as conferring jurisdiction on them to label certain magazines as "sexy" and then to find a violation of the statute against an advertiser therein, merely because such officials personally object to the name or the contents of a magazine whose publishers were not a party to the proceeding.[11]

4. It is also a well established principle of law that sex and obscenity are not synonymous, Roth v. United States (supra) wherein the court also observed:

---

11 For a discussion of the methods and "Comstockian" attitudes of enforcement officials of the Post Office Department, see "Obscenity and the Mails: A Study of Administrative Restraint" in Law and Contemporary Problems, Duke University School of Law, Vol. XX No. 4, at page 608 et seq.

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern". (citing) Thornhill v. Alabama, 310 U.S. 88.

5. It is also a well established principle of law that sanctions issued by the Post Office Department in excess of authority may not be applied against a lawful enterprise; Sunshine Book Company v. Summerfield, 95 App. D.C. 169; 221 F. 2d 45; Cert. Denied 349 U.S. 921; Tourlanes Publishing Company v. Summerfield, 98 App. D.C. 20; 231 F. 2d 773; Oakley v. Summerfield, 98 App. D.C. 22; 231 F. 2d 775.

6. He ignored or rejected the persuasive decision of the United States Court of Appeals for the 9th Circuit in Olesen v. Stanard, 227 F. 2d 785, 787, 788 (1955)[12] that under the statute here involved, where there is no evidence that the wares which might be sent to one who ordered them through the mails in response to a circular letter, would be in fact a violation of the statute, there is no violation, and that where the hearing included merely evidence of circulars inviting purchase of merchandise presumably within the ban of the obscenity statute, but not the merchandise itself, the order issued subsequent to the hearing, was invalid. The court further observing:

> "The field for * * * operation within the law and within the representations of the circulars is a broad one and not every indelicacy or every suggestive matter is obscene, lewd, lascivious, indecent, filthy or vile".

---

12 This is the same case in which Mr. Justice Douglas, sitting in chambers as a Circuit Justice, had previously observed; "The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or business is a power that touches basic freedoms." Stanard v. Olesen, 98 L. ed. 1151.

Instead appellee sought to rely on Hornick v. United States, (CCA 3d) 219 F. 2d 120, a case arising under a different statute (18 U.S.C. 1461). While it is appellant's contention that Stanard is the persuasive decision, being directly in point, yet it should be observed that in both cases, "circulars" mailed by the person charged were the basis of the charges, -- not certain "types" of magazines as here, which this appellant neither mailed, nor had any control over, and which either did not pass through the mails at all, or had special mailing privileges as second-class mail matter. If in fact any such magazines were obscene, the circulation of same through the mails should have been stopped at the point of offer of deposit, by the Post Office Department revoking the second-class mailing privilege or by invoking the provisions of 18 U.S.C. 1461, -- as it did in the second Sunshine Book Co. v. Summerfield case (#12,622 in this court; decided October 3, 1957) __ App. D. C. __, __ F. 2d __. It is therefore apparent that appellees' representatives, are not prepared to apply their mail-stoppage powers against magazines which in their opinion are only "sexy" -- not obscene.

7. There must be substantial credible evidence of record to support an administrative order imposing sanctions on a citizen, Administrative Procedure Act of 1946 (5 U.S.C. 1006(c)); Universal Camera Corporation v. NLRB, 340 U.S. 474.

When not enough evidence is offered to justify a conclusion based upon judgment and not guess work, the requirements of the judicial process are not met, Union Pacific R. Co. v. United States, 313 U.S. 450, 474.

Here there was not only no evidence of mailing of the advertisements by appellant, but no evidence that the admittedly inoffensive book "Illustrated Encyclopedia of Sex", actually existed. There was definitely no effort made to meet the burden fixed by

Section 7(c) of the Administrative Procedure Act, (5 U.S.C. 1006(c)) of proving the allegations of the complaint, for no evidence whatsoever was offered as to the existence or character of the people who were alleged to be readers of "sexy" magazines or that any existing person ever ordered the book in response to the advertisement, or that any minor ever purchased a copy of the book from appellant through the mails.

II. GRAVE CONSTITUTIONAL QUESTIONS HAVE ARISEN BY THE ACTION IN STOPPING APPELLANT'S MAIL

The Deputy Postmaster General's action in banning the delivery of mail matter addressed to appellant is prospective in effect, so that all future orders for any of the numerous books distributed by appellant and the remittances accompanying such orders or any other business mail, cannot be received by appellant through the United States mails after the issuance of the "unlawful" order. Responses to advertisements appearing in any type of periodical or newspaper a month or a year from now soliciting mail orders for one of appellant's books, could not be delivered. And that is exactly the crux of the matter, for the Deputy Postmaster General has not only arbitrarily decided that advertisements of the book "Illustrated Encyclopedia of Sex" which are to, or which might, appear in a future issue of a magazine which might come within his present opinion of "sexy": -- "most likely would connote a book which describes sex stimulating writings and illustrations",[13] so as to cause a ban on receipt of responses to such advertisement, but has also decreed that orders for other of appellant's inoffensive publications cannot be delivered. See Summerfield v. Sunshine Book Co. #1, Supra, wherein this court observed that were the statute to be construed to authorize such a wide order "grave constitutional questions would then be presented" (221 F.2d 48).

---

13 See footnote 10 p. 14, ibid.

The Deputy Postmaster General and the court below, has also ignored or rejected the well established rule of law that a prior restraint of a publication not yet in being based upon a finding against a past issue, constitutes an unconstitutional invasion of the guarantees of freedom of expression and the press under the First Amendment of the Constitution. Nears v. Minnesota, 283 U.S. 697, 716-718, wherein the Chief Justice stated: "This is the essence of censorship". This doctrine against "previous restraint" has only recently been reiterated by the Supreme Court in Kingsley Books v. Brown, 354 U.S. 436; 1 L.ed 2d 1469, 1476. It has also found approval in the second Sunshine Book Company case (No. 12,622 in this court), supra, both in the division's opinion of May 31, 1956 and the en banc rehearing opinion of October 3, 1957. See also Consumers Union v. Walker (supra).

Actually what has happened is that appellees have mistakenly applied against appellant's book and appellant's entire business, sanctions which should have been directed to the periodicals whose circulation they object to -- if such periodicals could have been found to be obscene -- not just "sexy" -- whatever that word may mean. In this connection, it should be noted that the word "sexy" does not appear in the statute -- the proscription thereof being limited to "obscene, lewd, lascivious, indecent, filthy or vile" articles. Since "sex" is not synonymous with obscenity (Roth v. United States, supra) and since all the descriptive words appearing in the statute relate to the same thing, namely, "obscene" -- it follows that appellees have legislated by adding a new category ("sexy") to the descriptive language of the statute.

The clear rationale and intent of that part of the statute invoked by appellees, (depositing in the mails information as to where and from whom, etc.), is that delivery of responses to such information sent through the mails, can be stopped, provided the information relates in fact to an obscene object. There must certainly be some relation between the information and an existing obscene object. Even the

court below seemed to have recognized the fallacy of appellees' position and theory in this respect, for when, during the course of the hearing on the motions during a colloquy after counsel for appellees stated that there was no contention that the book is obscene, he remarked: "If that is so then what you really are charging the plaintiff with is defrauding the public, namely, that they are advertising obscene material that is not obscene". (Appellant's App. 50). Counsel for appellees then conceded: "In effect it is that", and the court then asked: "Well shouldn't that be under the mail fraud statute instead of under the obscenity statute?".

Where the meaning of statutory phraseology is not obscure or ambiguous, the courts have the duty to apply the language literally as written, and no recourse to extraneous material to ascertain the legislative intent, is necessary or required. Cf. In re Lambert, 203 F. 2d 607.

In a case such as this, the regulatory provisions of the Act invoked to create a penalty, must be strictly construed. Alberty v. United States, 159 F. 2d 278, 280; Cf. United States v. Cardiff, 344 U.S. 174. If a construction of an act is possible that will save it from being constitutionally infirm, then courts will adopt that construction. Cf. United States v. Five Gambling Devices, 346 U.S. 441, at page 449, the Supreme Court stated:

> "Our policy in constitutional questions is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." (Emphasis supplied)

"If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that to include it within the statute would be to legislate and not to construe legislation" France v. United States, 164 U.S. 676, 682, 683; cited with approval in United States v. Halseth, 342 U.S. 277, 280, wherein the court also stated

"In the instant case, too, the statute is penal and must be strictly construed."

But when a statute is so vague, indefinite and uncertain, and when there is no ascertainable test or standard of prohibition or guilt set up by which a person could ascertain whether or not his actions or his contemplated actions are violative thereof, or give fair warning as to what actions create penalties, the statute is unconstitutional. United States v. Cardiff, supra; United States v. Five Gambling Devices, supra; Connally v. General Construction Co., 269 U.S. 384; United States v. L. Cohen Grocery Co., 255 U.S. 81; United States v. Weitzel, 246 U.S. 533; McBoyle v. United States, 283 U.S. 25; Lanzetta v. New Jersey, 306 U.S. 451. See also Screws v. United States, 325 U.S. 91, and Winters v. New York, 333 U.S. 507, 515 wherein it was said:

> "Men of common intelligence cannot be required to guess at the meaning of the enactment."

The question arises as to whether constitutional rights and privileges are infringed upon, when an Act is interpreted in such a manner as to make the publication of the written word subject to penalties, when the writing per se is not malum prohibitum, Cf. Mr. Justice Douglas' opinion in Stanard v. Olesen, supra. Freedom to learn is the great aim of freedom of expression. It is indeed one of the great values in a free society. It was brought clearly to focus by Meyer v. Nebraska, 262 U.S. 390. Freedom of speech is now preferred in the American system against both state and federal action, and because the legislative branch is granted no powers to regulate it. See Thomas v. Collins, 323 U.S. 516. Cf. Poulos v. New Hampshire, 345 U.S. 395; Edelman v. California, 344 U.S. 357.

In Burstyn v. Wilson, 343 U.S. 495, 592, the Court said: "That books, newspapers and magazines are sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment" (citing Grosjean v. American Press, 297 U.S.

233; Thomas v. Collins, 323 U.S. 516, 531) and at page 503: "But the basic principles of freedom of speech and press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." And at page 506: "We hold * * * that under the First and Fourteenth Amendments, a state may not ban a film on the basis of a censor's conclusion." In the present case, the censorship has been applied against certain "sexy" magazines, which are not even party to the action, -- not against appellant's book. But appellant is made to suffer the destruction of its whole publishing business, on the theory of guilt by association.

In discussing the broad reach of the First Amendment, the Supreme Court has only recently in Roth v. United States (supra at p. 488) stated:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar, it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest". (Emphasis supplied.)

It therefore follows that either the action in applying the obscenity statute to the situation at hand, is an unconstitutional invasion of rights guaranteed by the First and Fifth Amendments, and is actually legislative in nature and quality, or the statute is unconstitutional, both because it lacks necessary standards under which every writing or publication having to do with the natural relations between man and woman, could be labelled obscene and its distribution banned, and because it fails to give adequate warning that the publisher of an inoffensive,

scientific work on sexual psychology, is giving information as to where to obtain obscene material, when he advertises in a type of magazine which might at some future time be given a vague and uncertain label called "sexy".

III. THE PROCEDURES AND ORGANIZATION RESULTING IN THE DEPUTY POSTMASTER GENERAL'S ACTION FAILED TO ACCORD DUE PROCESS OF LAW AND ARE CONTRARY TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

The statute (39 U.S.C. 259(a)) provides that the Postmaster General may issue "unlawful" orders only upon evidence satisfactory to him, and thus there can be no valid agency order or sanction issued by subordinate officials upon an invalid delegation of quasi judicial authority by the agency head who is the only person granted such authority by the statute, and by the Administrative Procedure Act of 1945 (5 U.S.C. 1007); such delegation to be valid must be by express congressional permission, cf. Cudahy Packing Company v. Holland, 315 U.S. 357; 42 am. jur., Public Administrative Law Section 73. "It is more or less elementary that -- an administrative body cannot delegate quasi judicial functions --" Krug v. Lincoln National Insurance Company, 245 F.2d 848, 853, citing Shreveport Engraving Company v. United States, 143 F.2d 222; cert. denied 323 U.S. 749 cf. Savoretti v. Small, 244 F.2d 292.

As this court said in Briehl v. Dulles, __ App. D.C. ___; 248 F.2d 561 (decided June 27, 1957) "Delegations of Authority must be construed narrowly when a narrow construction avoids serious constitutional questions", citing United States v. Rumely, 345 U.S. 41.

The Deputy Postmaster General's claim of jurisdiction is based upon Rules of Practice before the Post Office Department dated January 20, 1954, which were issued after the Hearing Examiner's initial decision in favor of plaintiff, and which were designed and intended to remove from the control of the Hearing Examiner his properly delegated

authority to make a final determination as to the sufficiency of a complaint as provided by the valid Rules of Practice dated November 6, 1952, under which the proceedings before him were conducted, and which limited the right of appeal to the Postmaster General solely to a respondent affected by an adverse decision of the Hearing Examiner, and such new and modified rules which contained a delegation of authority from the Postmaster General to the Deputy Postmaster General, were not published in the Federal Register as required by the Administrative Act (5 U.S.C. 1002(a)) which states that no person shall in any manner be required to resort to organization or procedure not so published. Cf. Hotch v. U.S., 212 F.2d 280; Woods v. Benson Hotel Corp., 75 F. Supp. 743. It is the settled rule that a valid administrative regulation binds the Administrator himself equally with others. United States v. Flinn, 127 F. Supp. 158, 165 citing United States ex rel Accardi v. Shaughnessy, 347 U.S. 26; Chapman v. Sheridan-Wyoming Co., 338 U.S. 621, 629; Bridges v. Wixon, 326 U.S. 135, 153; See also Jeffries v. Olesen, 121 F. Supp. 463, 476.

In the instant case, the Regulation under which the complaint against plaintiff was tried and adjudicated, gave full and conclusive control over the complaint to the Hearing Examiner. (Sec. 150.404 -- Appellant's App. 9) and his action in dismissing the complaint, was final and non-appealable.

The Deputy Postmaster General is not an impartial tribunal entitled to determine such a controversy so as to comply with the fundamental concept of due process of law, Cf. Lee v. Flemming, 158 F.2d 984. In the instant case in arriving at his decision, he relied on new matters not pleaded or urged before the Hearing Examiner, but which were tendered by the legal advisor to the Postmaster General and his deputies. Said advisor also served as prosecutor both before the Hearing Examiner and on appeal. The Deputy Postmaster General did adopt, at the suggestion of said Solicitor, a new and distinct

cause of action against plaintiff, not included in the original complaint, and did consider new factual matters -- plaintiff being given no opportunity to be properly heard on such new evidence and new conception of the case or to have a determination of the affirmative defenses pleaded by its answer to the complained, which issues the Hearing Examiner did not pass upon since his decision was favorable to appellant on another issue.

The prosecuting official being also the legal advisor to, and within the same administrative framework as, the Deputy Postmaster General who is neither the agency head nor the official named in the statute -- there is no separation of prosecuting and adjudicating functions on that level as required by Section 5(c) of the Administrative Procedure Act. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33.

The Deputy Postmaster General's decision was not based upon substantial, credible evidence, but upon conjecture and his own personal opinion as to the character of some of the magazines in which plaintiff advertised -- an opinion not shared by the Hearing Examiner as the trier of the facts whose findings must be sustained if supported by any substantial evidence. Cf. Ellison v. Frank, 245 F.2d 837, 839 and cases cited.

The decision of the Hearing Examiner in favor of appellant is entitled to great weight upon a judicial review, and where it appears that the findings of the Hearing Examiner are supported by a preponderance of evidence action of the Agency in rechecking them is arbitrary. Minneapolis Honneywell Company v. Federal Trade Commission, 191 F.2d 786.

The rule with respect to substantial evidence is too well known to require reiteration except to refer to Universal Camera Corp. v. NLRB, 340 U.S. 474. The modern due process of law rule as to notice, hearing, and administrative adjudication stems from Morgan v. United States, 298 U.S. 468. These rules of law are incorporated

in, and have been expanded upon, in the Administrative Procedure Act and the decisions thereunder. The opinion in the second case of Sunshine Book Co. v. Summerfield, __ U.S. App. D.C. __; __ F.2d __, No. 12,622, decided by this court October 3, 1957, on rehearing, while involved with a different statute, refers to the necessity of a "hearing in accord with procedural safeguards", in the Post Office Department.

IV. APPELLEES ARE ESTOPPED FROM ISSUING SANCTIONS AGAINST A MAIL USER AFTER THERE HAS BEEN A PREVIOUS AND FINAL AGENCY ADJUDICATION IN FAVOR OF THE SAME MAIL USER BASED UPON THE SAME SUBJECT MATTER.

The final decision of the Office of Hearing Examiners of the Post Office Department entered August 21, 1952, (Docket No. 1/244) in the prior proceeding against Cadillac Publishing Company, at New York, New York, was res judicata as to the issues presented in the present case, it having been determined in that prior proceeding that the book "The Illustrated Encyclopedia of Sex" is not a lewd, lascivious, obscene or indecent publication and that advertising of the book similar in form and context to the advertising of respondent appearing in magazines and newspapers of general circulation, do not describe said book as containing obscene, lewd, lascivious and indecent matter.

It is a well established rule of law "that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent action between the same parties; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties, be taken as conclusively established so long as the judgment in the first suit remains unmodified." Quoted with approval from Southern Pacific R. Co. v. U.S., 168 U.S. 1, 48, 49, by the Supreme Court of the United States in U.S. v. Munsingwear, Inc., 340 U.S. 36. Cf. Brown v. Brown, 74 App. D.C. 309, 310; 122 F.2d 219, 220 wherein it was held that where the second action between the same parties is

upon a different claim or demand, the judgment in the prior action operates as an estoppel as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

This doctrine has been extended by the Federal Courts to include cases where two different agencies of government and two different statutes were involved. See U.S. v. Willard Tablet Co., 141 F.2d 141 (Federal Trade Commission - Food & Drug Administration), and Lee v. Federal Trade Commission, 113 F.2d 583 (same agencies involved).

As was said in Lee v. Federal Trade Commission, supra:

> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by final decree of the court or final order of the board, there can be no end to a controversy * * *" "The government had had its full day in court on that issue, had lost its case and could not collaterally attack, either directly or indirectly, the decree entered against it." (Emphasis supplied). See also Supreme Court cases cited as authority therein.

Applying the law to the instant situation, there is even more cogent reason for applying the rule. In the instant case, we not only have the same parties, but we have the same tribunal. The previous case presented the same identical issue and the same identical facts; namely, does the advertisement of the book "The Illustrated Encyclopedia of Sex" offer an obscene book for sale through the mails, and the further question, is the book obscene? Both questions were affirmatively adjudicated in favor of the respondent in the prior proceeding -- that is, that the advertisements do not describe an obscene book, and the book is not obscene. The mere fact that two different postal fraud or unlawful order statutes are involved, is of no consequence, as pointed out in the authorities cited -- for the issues are the same in both proceedings.

CONCLUSION

In conclusion, appellant respectfully invites the court's attention to Agnew v. Federal Reserve System, 80 U.S. App. D.C. 377, 152 F.2d 785 (reversed on other grounds 329 U.S. 441), wherein this Court at Page 380 cites the dissent of Judge Frank of the Second Circuit in Dequesne Warehouse Co. v. Railroad Retirement Board, 148 F.2d 473:

> "I note in passing that in this Circuit we have not believed that the Supreme Court has suggested that we submit to 'administrative absolutism', and consequently we have not hesitated to protect the legal rights of citizens when administrative officers have acted in excess of their statutory powers."

Wherefore, the premises considered, it is respectfully urged that the decision of the District Court be reversed and that the cause be remanded to that court with instructions to enter its judgment and decree permanently enjoining the Postmaster General and his subordinates from enforcing the order issued by the Deputy Postmaster General.

Respectfully submitted,

HORACE J. DONNELLY, JR.
730 Fifteenth Street, N. W.
Washington 5, D. C.
Attorney for Appellant

SUPPLEMENTAL MATTER

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,437

MERLE E. PARKER, Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the
United States, Appellee.

SUPPLEMENTAL MEMORANDUM

The Court has directed this office to furnish information pertaining to the particular dates on which the various Post Office rules of practice in proceedings under the Administrative Procedure Act were published in the Federal Register.

On December 1, 1954, the Post Office Department published in the Federal Register the rules of practice that would be applicable when adjudication is required by the Administrative Procedure Act, F.R. Vol. 19, p. 7848. Except for minor changes these particular rules are substantially the same as the unpublished amended practice rules of January 20, 1954, and which are set forth at page 33 of the joint appendix. The Department's rules of practice amended as of November 6, 1952, and which are set forth at page 16 of the joint appendix, were published in the Federal Register on November 6, 1952, F.R. Vol. 17, p. 9983, and July 10, 1951, F.R. Vol. 16, p. 6682.

Respectfully submitted,

/s/ OLIVER GASCH
OLIVER GASCH
United States Attorney

/s/ LEWIS CARROLL
LEWIS CARROLL
Assistant United States Attorney

/s/ FRED L. McINTYRE
FRED L. McINTYRE
Assistant United States Attorney

POST OFFICE DEPARTMENT

Office Of Hearing Examiners

Washington 25, D. C.

August 21, 1952.

In the Matter of the Complaint That CADILLAC PUBLISHING COMPANY, INC., CADILLAC PUBLISHING CO., INC., and M. ROBERTS, at New York, New York, are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U.S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).	H.E. Docket No. 1/244

INITIAL DECISION OF HEARING EXAMINER

The complaint and notice of hearing were served on Respondents March 10, 1952. To the complaint and prior to answer, Respondents filed various preliminary motions, including a motion to dismiss on the ground, among others, that the complaint failed to state a cause of action against them. These motions were denied and on April 14, 1952, Respondents filed a written answer. Thereafter, on May 15, 1952, Respondents filed a motion for reconsideration of their previous motion to dismiss, and the case proceeded to hearing before me on May 23, 1952. It was agreed at that time that the hearing would be

upon Respondents' motion to dismiss and that any evidence received at that time would be received for consideration in connection with that motion (Tr. 5-10).

At the conclusion of the hearing Respondents were permitted to file a written memorandum in support of their motion, and the Solicitor has filed his reply thereto. The entire official record, as thus made, has been considered by me in arriving at this decision.

The complaint alleges in substance that Respondents are engaged in using the mails to defraud, in violation of the statutes invoked, in that they are obtaining and attempting to obtain remittances of money through the mails for a book entitled "The Illustrated Encyclopedia of Sex" by means of false and fraudulent representations to the effect:

a. That to persons remitting through the mails the sum of money solicited, the respondent will furnish a book entitled "The Illustrated Encyclopedia of Sex", "a book on sex relations that defies imagination," "the most eye-opening and revealing book you have ever seen," with "hundreds of startling pictures", "illustrations of the sexual apparatus of both sexes, at rest as well as in function", and "ALIVE WITH COLOR PICTURES SHOWING EVERY SEX FUNCTION"; that is to say that the said book contains text, illustrations and pictures of a lurid and sexually erotic nature which are obscene, lewd, lascivious, indecent, filthy or vile.

b. It is further charged that such captions, pictures and subject titles in respondents' advertisements as "Picture Story of How Erection and Ejaculation Occur"; "Schematic Representation of the Sexual Act showing why in most cases women fail to attain climax. Where the man has premature orgasm with early ejaculation, in most cases the woman cannot attain orgasm"; "Schematic representation of simultaneous organsm"; "Anatomy of Male Member in the erect state, showing the correlation of all the sexual glands of man"; "Picture

story of various causes for sexual excitation and erection"; "Latest Sex Facts presented frankly and bluntly"; "Packed with Rare, Real Life color Pictures never before printed in this country.' "; "Most Advanced Outspoken Sex Guide we have ever offered"; "Picture story of normal sexuality in man", and others of similar character, are intended to and do lead the reader to believe that the book "The Illustrated Encyclopedia of Sex" contains sexually and erotically stimulating matter of an obscene, lewd and lascivious nature.

At the hearing upon the motion to dismiss, counsel for the Solicitor offered, and on Respondents' waiver of identification, there was received in evidence with other matter, printed circulars used by Respondents to advertise the book in question for sale through the mails (Sol. Exhibits 1-A, 1-A-1) and the book itself (Sol. Exhibit 2).

Both parties to the proceeding have agreed and conceded that the advertised volume is not obscene, lewd, lascivious, indecent, filthy or vile. Hence, disposition of this case as it is presented under the pleadings turns upon the sole question of whether Respondents' advertising literature, properly interpreted, may reasonably be said to represent, in the language of the complaint, that the book "contains text, illustrations and pictures of a lurid and sexually erotic nature which are obscene, lewd, lascivious, indecent, filthy or vile," and whether, by reason of certain captions, pictures and subject titles contained in those advertisements, Respondents intend to represent that the book contains "sexually and erotically stimulating matter of an obscene, lewd and lascivious nature."

Based upon my examination of Respondents' advertising circulars, and my consideration of the briefs and arguments submitted by both parties in support of their respective positions, it is my conclusion that these circulars, considered in their entirety, do not support the allegations of the complaint, to the effect that Respondents are holding forth to the public the promise of an obscene, lewd, lascivious and indecent volume.

It is now well settled by Federal court decisions that works containing serious instruction relative to sex matters are not within the prohibition of Federal statutes prohibiting the sale of obscenity through the mails and the importation thereof from abroad. By analogy an exemption in favor of such works must, under proper facts and circumstances, be given consideration in the administration of Public Law 699. As previously stated, the parties to this proceeding have conceded that the book being sold by Respondents is not obscene. Therefore, the complaint must fall if, in considering Respondents' motion to dismiss, it cannot reasonably be held that Respondents' advertisements predominantly and effectively depict the book as being something more than a work containing serious sex instructions; so much more in fact that the ordinary reader of these advertisements may reasonably conclude that an obscene volume is being offered for sale.

The charge that Respondents are offering obscenity evidently is based upon the appearance in their advertisements, according to the complaint, of such phrases and expressions as "a book on sex relations that defies imagination," "the most eye-opening and revealing book you have ever seen" with "hundreds of startling pictures," "illustrations of the sexual apparatus of both sexes, at rest as well as in function," "Alive with color pictures showing every sex function" and others which appear in that portion of the complaint hereinbefore quoted.

However, as against the over-all impression and pervading effect which the complaint alleges such expressions combine to create, it is a fact that by far the greater portion of the space in Respondents' advertising circulars is devoted to setting forth, with accuracy, and without exaggeration or resort to sensual coloring, a concise description of the illustrations and pictures contained in the book, a partial list of contents by chapter, and a description of some of the sex problems that are discussed in the volume. The advertisements further inform the reader that the book was "compiled by a group of outstanding medical authorities," naming three such persons. A reproduction of the front cover

of the volume appears on one of the pages of the circulars on which the names of the three doctors who compiled it again are shown as authors. It is referred to as being "by far the most advanced work of its kind you have ever seen"; as containing "just the kind of honest and frank information for which there is so startling a need"; as being "a guide throughout life to better sex relations in married life"; as being "an important contribution to the cause of Sexual Enlightenment"; as containing the "latest sex facts presented frankly and bluntly"; as containing "all the information so vitally needed for understanding your own sexual nature - and that of others"; as containing such sex information as will enable the reader to "profit from real life experience of the noted physicians who collaborated on this book - with most expert medical artists [again naming the physicians]"; and that "Given these frank facts many troubled men and women have found new joy in marital relations - and new confidence in themselves for successful happy living."

As has been previously stated the greater portion of Respondents' advertising circulars is devoted to a chapter by chapter and picture by picture representation, uncolored and impartial, of the contents of the book. These listings, as examination of the book discloses, accurately depict its contents. The dominant effect of the circulars, considered as a whole and having regard for the language quoted in the preceding paragraph, may reasonably be said therefore to be such as would produce the impression upon the ordinary mind of a book written by eminent physicians, containing serious, advanced sex instruction of a more revealing and blunter character than books dealing with the same subject which have been previously available to the public. This, at least, is as reasonable and as consistent a hypothesis as an interpretation, based upon the excerpts upon which the complaint relies, of a book which is obscene, lewd, lascivious, indecent, filthy and vile. It is a rule of law that evidence which is consistent with two hypotheses tends to prove neither.

It may be that some of the adjectives used in the circulars would

create a suspicion in the minds of some members of the public that an obscene book was being offered for sale. Such a suspicion, however, is not substantial evidence upon which to base a finding or conclusion that Respondents in fact are advertising for sale an obscene, leud, lascivious, indecent, filthy or vile publication.

For all of these reasons Respondents' motion to dismiss the complaint should be, and the same is, hereby granted.

Hearing Examiner.

[September 16, 1952]

RBM:omd
2/173

September 12, 1952

In the Matter of the Complaint Against) H. E. Docket No. 1/244
CADILLAC PUBLISHING CO., INC., ET AL.,) Withdrawal of Notice
at New York, New York.) to Appeal.

Having filed a Notice of Intention to Appeal from the Initial Decision of the Hearing Examiner in the above-entitled case, the Solicitor for the Post Office Department hereby gives notice that such appeal will not be perfected.

/s/ Roy C. Frank
Solicitor for the Post Office Dept.
/s/ Ralph B. Manhers
Attorney, Office of the Solicitor.

To the Chief Hearing Examiner
Of the Post Office Department.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 21 1958
Joseph W. Stewart
CLERK

No. 14,205

CADILLAC PUBLISHING COMPANY, INC.,

Appellant,

v.

977

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HORACE J. DONNELLY, JR.
American Security & Trust Building
Washington 5, D. C.
Attorney for Appellant

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

INDEX

	Page
FURTHER STATEMENT OF THE CASE	1
ARGUMENT:	
I. Reply To Appellees' Contention That The "Unlawful" Order Issued By The Post Office Department Is Supported By Substantial Evidence	2
II. Reply To Appellees' Contention That Appellant Cannot Evade The Sanctions Of 39 USC 259(a).	11
III. Reply To Appellees' Contention That The Procedures Followed By The Post Office Department Accord With Due Process Of Law And The Administrative Procedure Act	16
CONCLUSION	21

TABLE OF CASES

Borak v. Biddle, 141 F. 2d 278	18
Churchill Tabernacle v. Federal Communications Commission, 160 F. 2d 244	20
Farley v. Simmons, 99 F. 2d 345	5, 6
Glanzman v. Hinkle, 150 F. Supp. 823	12
Hannegan v. Esquire, 327 U.S. 146	7, 8
Homick v. United States, 229 F. 2d 120	4, 5
Jason v. Summerfield, 214 F. 2d 273	20
Kingsley Books v. Brown, 354 U.S. 436	5, 14, 15
Klaw v. Schaeffer, 151 F. Supp. 543	12
Kuhn v. Civil Aeronautics Board, 183 F. 2d 839	9
Lee v. Civil Aeronautics Board, 225 F. 2d 950	9, 17
McKay Radio v. National Labor Relations Board, 304 U.S. 333	10
National Labor Relations Board v. Greater New York Broadcasting, 147 F. 2d 337	10
Niagara Mohawk Power Co. v. Federal Power Commission, 202 F. 2d 190	20
Oakley v. Summerfield, 231 F. 2d 775	5, 11, 12
Olesen v. Stanard, 227 F. 2d 785	4
Pike v. Walker, 121 F. 2d 37	12
Public Clearing House v. Coyne, 194 U.S. 497	12
Roth v. United States, 354 U.S. 476	10, 12, 13, 14

INDEX (Cont'd.)

	Page
Sunshine Book Co. v. Summerfield #1, 221 F. 2d 42	5, 11, 12, 21
Sunshine Book Co. v. Summerfield #2, 249 F. 2d 114	11, 13, 14, 15, 21
Tourlanes Publishing Co. v. Summerfield, 231 F. 2d 773	5, 11, 12
United States v. DeGignac, 113 F. 197	4
United States v. Grimm, 50 F. 528	4
United States v. Halseth, 342 U.S. 277	13
United States v. Levine, 83 F. 2d 186	3
United States v. One Book Ulysses, 72 F. 2d 707	11
United States v. Parmalee, 113 F. 2d 735	11
United States v. Rebhuhn, 109 F. 2d 512	3, 10
Ex Parte Jackson, 96 U.S. 727	14
Milwaukee Social Club v. Burleson, 255 U.S. 407	14
Reilly v. Pinkus, 338 U.S. 269	14
One, Inc. v. Olesen, No. 290 Oct. Term 1957	13

TREATISES

Obscenity in the Mails: Vol. 106 U. of Pa. Law Review, 214	14

REGULATIONS

39 C.F.R. Sect. 201.1	8
39 C.F.R. Sect. 1.9(h)	19

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,205

CADILLAC PUBLISHING COMPANY, INC.,
A Corporation,

Appellant,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

FURTHER STATEMENT OF THE CASE

Under subparagraph b of appellees' counter-statement of the case, it is asserted that there was offered in evidence before the Hearing Examiner in the Post Office proceedings "Advertisements of the book 'Illustrated Encyclopedia of Sex'" clipped from the various magazines named and referred to in the complaint. The magazines referred to are part of the record in this appeal. Of the sixteen exhibits there are eight different magazines and five copies of different issues, which on

their face indicate that the publications are entered as second class mail matter in the Post Office and two other magazines with one additional copy of a separate issue, which do not on their face appear to be entered as second class mail matter at the Post Office. All of these issues, with the exception of one bearing an August 1952 dateline, bear dates between April and September 1953.

Appellant takes exception to the counter-statement (p. 3) that there was evidence that four of these second-class entry magazines admitted into evidence in the administrative proceeding (Exhibits 1-R; 1-S; 1-T; 1-U), had been declared non-mailable as obscene matter. As the objection to admission shows (App. 97) these exhibits containing inter-office memoranda, do not show the grounds upon which opinion as to non-mailability, was predicated -- whether because of obscenity or because of some other factor.

Appellees in the same subparagraph of their counter-statement of the case refer to appellant's offer in evidence before the Hearing Examiner of a collection of statements made by persons who had ordered the book by mail in response to appellant's advertisements, which offer was rejected as irrelevant (App. 106, 108). Not having been accepted by the Hearing Examiner, such statements do not appear of record, but appellant believes that such statements would have become relevant and material if the new theory and new complaint adopted by the Deputy Postmaster General in his decision had been urged by the prosecuting official in the proceedings before the Hearing Examiner.

I

REPLY TO APPELLEES' CONTENTION THAT THE "UNLAWFUL" ORDER ISSUED BY THE POST OFFICE DEPARTMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellees have conceded that the Deputy Postmaster General's finding that the appellant was obtaining remittances of money through the mails for obscene matter, is, in effect, entitled to no consideration here. In that respect, therefore, appellees' disinclination to urge the

validity of such a finding is tantamount to a confession of error on this point.

This concession, therefore, leaves for determination by this court under this part of the questions presented, only the issue as to whether appellant was in fact depositing information in the mails as to where, how, or from whom an obscene article, matter, thing, device or substance may be obtained, and whether under all the circumstances of the case, Section 259a, Title 39 U. S. C., as construed by the Deputy Postmaster General and the court below, is constitutional under such a construction. Appellees cite United States v. Rebhuhn, 109 F. 2d 512, 514-515, (CCA 2d) for the proposition that a book dealing with sex which is not obscene per se, may become obscene when it is sold by advertisements plainly designed to catch the prurient and by direct appeals to the salaciously minded. It should be noted that Rebhuhn was charged with, and convicted of, the offense under what is now 18 U. S. C. 1461, of sending obscene printed matter through the mails, including circulars advertising books for sale and both the circulars and the books "were charged to have been obscene." At the trial of the defendants the prosecution proved to the satisfaction of the jury that the circulars set forth in the indictment were addressed to persons proved to be children of tender years, and as a consequence the United States Court of Appeals for the Second Circuit held that the conditional privilege doctrine previously established by the same court in Levine v. United States, 83 F. 2d 186 in reversing a conviction under the same statute, had been abused by Rebhuhn in this respect. In Rebhuhn the books advertised in the circulars addressed to children were placed in evidence, parts of which were read to the jury, resulting in a finding by the jury to the effect that the books themselves were obscene, and the Court of Appeals observed: "It was the books that offended, if offense there was". (p. 514). The Rebhuhn case does not support the contention here made by appellees.

By generalization appellees insist that if a dealer in salacious matter causes advertisements to be circulated through the mails which simply state "Men! Order obscene materials from us." such an ad-

vertisement of itself forms a valid basis for the issuance of an "unlawful" order. But even such a hypothetical generalization does not apply here for the reason, inter-alia, that it has not only been conceded by appellees but adjudicated in a prior proceeding that appellant is not a dealer in salacious matter.

Appellees in rejecting the doctrine of Oleson v. Stanard, 227 F.2d 785 (CCA 9) (the only United States Court of Appeals case directly on point under Section 259a, Title 39 U.S.C.) rely for support of their theory, on Hornick v. United States, 229 F.2d 120 (CCA 3rd) but as pointed out in appellant's brief Hornick was a case arising under the Criminal Statute (18 U.S.C. 1461) and it should further be noted that the adjudication (229 F.2d 120 (CCA 3rd)) was after a trial meeting all the requirements of due process of law and that there was a judicial determination that circulars mailed by the defendant (not advertisements appearing in magazines of general circulation) directly implied that obscene matter would be furnished. It is also noteworthy that the court relied for its opinion on two cases which were decided more than fifty years ago (United States v. Grimm, 50 F.528, affirmed in 156 US 604 and DeGignac v. United States, 113 F.197 Cert. denied 186 US 482. Grimm is clearly distinguishable in that the Supreme Court there said: "It is enough (as to a charge and proof) that in a certain place there could be obtained pictures of that character, obscene, lewd and lascivious pictures charged by the indictment as being in the possession of the defendants". In DeGignac the point involved was the sufficiency of an indictment in which it was asserted that the letter and circular deposited in the mails by defendant contained information from whom might be obtained certain obscene, lewd, lascivious photographs of nude women, "too obscene, lewd, and lascivious to be here described". In upholding the sufficiency of the indictment, the Court of Appeals for the Seventh Circuit stated, "It is sufficient that the character of the information be described leaving further disclosures to the introduction of evidence" (emphasis supplied). It should also be noted that the court in Hornick (p.122) particularly stated, "The Statute, Section 1461 says:

'Advertisements - - - giving information'". There is no such language in Section 259a, Title 39 U.S.C. so that it would appear to be the better rationale to suggest that Congress in the hope of avoiding an ambiguity intended the "giving information" proscription to apply to private information and not to public "advertisements" for Congress failed to include in the newer statute (259a) the proscription against "advertisements" appearing in the earlier Criminal Statute (1461). The same argument goes for Klaw v. Schaeffer 151 F. Supp. 543 (appeal argued January 10th, 1958, CCA 2nd), the only other case cited by appellees in support of their theory. However, while Klaw represented a Section 259a case it did not touch on the theory advocated by appellees, it being clear that only the question of obscenity was involved and in that regard the court stated (p. 539) that: "The Hearing Examiner found - - - the pictures are obscene."[1] Thus the argument of appellees that the principles of Hornick and Klaw are clearly applicable, is not tenable. Appellees further argue that by placing such advertisements in magazines which circulate through the mails appellant is "causing to be deposited in the United States mails, information, etc." and that appellant displays extraordinary naivete about business relations between an advertiser and the media it selects when appellant urges that there is no evidence to show it was responsible for the mailings of the magazines containing its advertisements. The only authority cited by appellees for their contention in this respect is Farley v. Simmons, 69 App. D.C. 110, 99 F. 2d 345 Cert. denied 305, U.S. 65, a case arising under the Fraud Statute (39 U.S.C. 259, 732) in which this court reversed the decision of the lower court (18 F. Supp. 758). Regardless of the dicta quoted by appellees from this court's opinion as to an inference "that one operating a business knows the nature of the contents of an advertising medium chosen by him", -- such an observation is not decisive of the question involved here, and even, if so, is not applicable for the reason that in Simmons there was no issue, and none

---

1 The District Court (Edelstein, J.) further held (p. 537) that the principles ennunciated by this court in Summerfield v. Sunshine Book Company, 95 U.S. App. D.C. 169, 221 F. 2d 42, 45 Cert. denied, 34 U.S. 921, Toulanes Publishing Company v. Summerfield, 98 U.S. App. 1/c 20 231 F. 2d 773 Cert. denied 352, 912 and Oakley v. Summerfield, 98 U.S. App. D.C. 22, 231 F. 2d 775, did not apply because prima facie all letters in Klaw were assumed to be identified with a prohibited enterprise.

would have been relevant as to whether or not the "advertising medium" was deposited in the mails. At most it was shown that the magazine containing the advertisement was offered for sale by a "spieler".

If the Simmons proceeding had been brought under the present administrative obscenity act (259a), could it now be said, that Simmons was depositing in the mails information as to where to obtain obscene material? Certainly, as here, Simmons did not deposit the magazine in the mail. Simmons further points up the fallacy of the theory advocated by Appellees, for as Simmons' material was not obscene, as represented, a fraud in violation of Section 259 of Title 39 U.S.C. was committed. The Post Office Department launched this identical attack on this appellant prior to the instant proceeding, and failed to produce evidence to support the charges.

Parenthetically, it is suggested on the issue of "depositing information" in the mails, that even though there is absolutely no proof, direct or inferentially, that appellant mailed the magazines, yet the following questions should be answered to clarify this issue:

Isn't it reasonable to take notice of the fact, that a publisher of a magazine having second class entry, if he wanted to get the cheapest transportation rate available, would follow the requirements of the Postal Regulations and deposit in the Post Office his many copies of an issue in compliance with such requirements?

Is it unreasonable to say that the entire contents of a magazine, including all advertisements therein, conveys "information" to the reader, and that therefore it is the publisher who furnishes that information?

In other words, isn't the wrong party involved here?

The "business naivety" ascribed to appellant by appellees would also seem to encompass the fact that the only advertising media selected by appellant's advertising agent which could even remotely have been said to have circulated through the mails, were periodicals entered at the Post Office as second class mail matter, entitling the publication to

be carried by special permission of the Post Office Department at the comparatively inexpensive postal rate prescribed by Congress (base rate 1 1/2 cents per pound) for regularly published periodicals, originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers (39 U. S. C. 226). Might it also be considered "naive" for appellant's officers to have reasoned that a publication which does not have the special second class mailing privilege would not be circulated through the mails because of the high mailing charges (base rate 1 1/2 cents per 2 ounces under 3rd class) when it is much cheaper for the publisher to transmit copies by express. Or for appellant's officers to have reasoned that it would be stupid for a mail order business to advertise in any publication which might be banned from delivery through the mails thus depriving an advertiser of responses to his advertisement? It is well established that the second class mailing privilege is not available to obscene periodicals -- and that under the Postal Regulations: "Postmasters shall carefully examine mailings of publications entered at their offices as second class matter to ascertain whether the publishers are complying with the law and these regulations". (39 C. F. R. 34. 58(c)). See also Hannegan v. Esquire, 327 U. S. 146. If a notice of entry as second class matter, as required by the Postal Regulations, appears in a publication, before such entry is granted, same is "false evidence." (39 C. F. R. 34. 44(b)) subject to the penalties of 18 U. S. C. 1722 (39 C. F. R. 34. 36).

It would seem, therefore, that if appellant advertised in any periodical having the second class mailing privilege, and the magazine was offered for mailing by the publisher of same, the fact that the magazine so offered was transported by mail at the exceedingly low postal rate would indicate that if the particular issue falls within a class of "unlawful" * mail matter, the responsibility for its transportation in the mails

* It is interesting to note, that nowhere in appellees' brief does counsel defend the Deputy Postmaster General's adoption, and application of the word "sexy" to certain magazines as an added category to the classification of obscenity contained in the statute, in order to justify his action in the instant case.

rested with the Post Office Department. If considered so objectionable by the enforcement officials of the Post Office Department as to be non-mailable, then it is incumbent upon such officials to bring a proceeding for the revocation of the second class entry permit as they did in Hannegan, (See 39 C. F. R. 201.1 (1955 revision) - or a non-mailable proceeding under rules published in 22 F. R. 8999. If revoked, or refused carriage in the mails then sound reasoning would indicate that that issue and all future issues of the magazine would not be accepted for mailing at the cheaper rates, and that the publishers instead of paying the much higher rate for other classifications of mail matter would transport their editions by some other and cheaper means, such as express.

The argument of appellees thus does not hold water, nor does their gratuitous statement that appellant approved advertisements which represented the book as if it were obscene, or that appellant, from the very delicacy of the subject, should have had notice of the need for a circumspection in its advertising. It will be observed from the initial and final decision of the Hearing Examiner in a prior proceeding (Appellant's brief S-3, S-4) that the language of the advertisements appearing in magazines was quite similar to that contained in circulars involved in the prior proceeding -- notwithstanding appellees' contention to the contrary. In this respect the finding of the Hearing Examiner in that case (Appellant's brief S-5) is apropos when he stated : "-- it is a fact that by far the greater portion of the space in respondent's advertising circulars is devoted to setting forth, with accuracy and without exaggeration or resort to sensual coloring, concise descriptions of the illustrations and pictures contained in the book, a partial list of contents by chapters and a description of some of the sex problems that are discussed in the volume". This finding would seem to apply four-square as a description of the contents of appellant's magazine advertisement here involved.

Appellees' argument (sub-paragraph c) that appellant cannot be heard to complain that the "giving information" offense was not charged

in the original complaint, is also untenable. It is practically conceded by appellees that appellant had no notice of this new and different charge when it went to trial before a Hearing Examiner, and that the first time this theory was advocated was in the prosecuting official's brief on appeal. Even the prosecuting official at the trial stated that: "The gravamen of the offense is obtaining or attempting to obtain the money by such means". (App. 103). In other words the issue was raised de novo by inserting a new ground of complaint in the Solicitor's so-called appeal brief with no evidence in support thereof. In effect, if we are to accept at face value appellees' admission that the "obtaining remittances" issue is no longer involved, then it would seem to follow that the prosecuting official's appeal to his superior in the Post Office Department was not an appeal at all, for the Hearing Examiner decided the conceded issue in favor of appellant and the Hearing Examiner's decision based upon the failure of proof to support the allegations of the complaint is, and was, completely and finally dispositive of that issue as framed by the complaint and appellant's answer. The prosecuting official's so-called appeal, therefore was no more than a new complaint made to a defacto tribunal. No hearing was ordered and none was held, and no evidence was offered. The Deputy Postmaster General, therefore, merely accepted the prosecuting official's new complaint, and without giving appellant any opportunity for a hearing and without authority or proper adjudication upon evidence, adopted the recommendations of the prosecuting official. None of the cases cited by appellee in support of their position in this respect even remotely bear on the instant situation. Such cases relate to proceedings under statutes which provide for judicial review as a matter of right -- not sanctions which may be imposed by administrative fiat under a statute which imposes penalty of forfeiture of property. McKay Radio v. NLRB, 304 U. S. 333, 349-351, merely held that there was no misunderstanding of the basis of the board's complaint, and that the employer had been afforded a full opportunity to justify his actions. Kuhn v. Civil Aeronautics Board, 87 U. S. App. D. C. 130, 183 F. 2d 839, referred to a case where there has been actual notice, and

that the parties understood exactly what the issues are when the proceedings are heard. Noteworthy is this court's statement: "The main proposition of the pleading should therefore be to give the trial court a proper understanding of the case" (citing Clark Code Pleading 30) (emphasis supplied), and in NLRB v. Greater New York Broadcasting Company, 147 F. 2d 337 (CCA 2) the same principle as stated in McKay was followed. But here the Hearing Examiner performing the functions of a trial court, had nothing before him to indicate that the issues involved, included a charge of "giving information" and it is submitted that if such a charge had been laid in the complaint then the Hearing Examiner could not have rejected as irrelevant the evidence which appellant (respondent there) sought to introduce (App. 81, 106) as to the character, background, and other characteristics of persons who purchased appellant's book in response to the advertisement appearing in the very magazines which had been introduced into evidence by the prosecution official, and which later were labeled as "sexy" by the Deputy Postmaster General.

Instead of injecting hyper-critical comment on appellant's naivety in the conduct of its business, it would seem to be more apropos to consider the facts from the record showing that appellant is a long established publisher of many books with varied titles, that it has twice after full administrative hearings, been found not to be violating the Postal laws in the advertising and sale of its work "Illustrated Encyclopedia of Sex"; that it has openly advertised the book for years in every type of periodical including daily newspapers, professional journals, almanacs, etc., indicating that it's officers have no hesitancy in offering the book to any mature person, as a valuable treatise on normalcy in a most important aspect of human conduct; and that it will not knowingly sell the book to adolescents or minors, even though it is under the law charged with no duty to insure that the book shall reach only proper hands (Rebhuhn v. United States, supra, 109 F. 2d 514) and the moral fibre of the community shall not be judged by the standards of a few. As was said by the Chief Justice in Roth v. United States, 354 U. S. 476 (1957): "It is the conduct of the individual that should be judged - - -. To do

otherwise is to violate the (First Amendment) - -". And as was said by this court in its opinion of May 31, 1956, Sunshine Book Co. v. Summerfield, No. 12, 622 (unreported - reversed en banc on re-hearing. U.S. App. D.C. , 249 F.2d 114 , which in turn was reversed January 13, 1958, No. 587 October Term 1957, 26 Law Week 3203):

"Furthermore neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases" (citing Parmalee v. United States, 72 App. D.C. at 209, 113 F.2d at 735; United States v. One Book, Entitled Ulysses, 72 F.2d at 707, 708.

II

REPLY TO APPELLEES' CONTENTION THAT APPELLANT CANNOT EVADE THE SANCTIONS OF 39 USC 259(a).

Appellees ask the court to reconsider the principle of Summerfield v. Sunshine Book Co., 95 U.S. App. D.C. 169, 221 F.2d 42, Cert. denied 349 U.S. 921; Tourlanes Publishing Co. v. Summerfield, 98 U.S. App. D.C. 21, 231 F.2d 773, Cert. denied 352 U.S. 912; and Oakley v. Summerfield, 98 U.S. App. D.C. 22, 231 F.2d 775, Cert. denied 352 U.S. 912, that an order such as is involved here is too broad when applied to lawful as well as unlawful mail matter -- otherwise constitutional infirmities arise. While appellees claim to see no meaningful distinction between the administrative stop order in this case and the orders involved in the above cases, yet the record here discloses even stronger reasons why the principle is correct in law. Here, appellant is strictly a legitimate, long-time publisher, and distributor of many different types of books on varied subjects. Thus it cannot be said, as appellees infer, (Brief p. 15) that appellant is guilty of operating, "an illegal mail order business -- deliberately organized to combine legal and illegal activities so that they are inseparable". -- which is the basis for the request for reconsideration of this principle in the above cases. Neither is there any burden on appellant to come "forward with a practical basis for effectively limiting the stop order."* As Appellees point out, appellants sealed

* See App. 5, 16 for an example of how department officials treat a voluntary offer of a mail-user to cooperate by eliminating the cause of complaint even after an adjudication in the mail-user's favor.

mail cannot be opened by the Post Office. It is axiomatic that privacy may not be invaded by government inspectors except in accord with law. Congress, as pointed out in Sunshine I supra, (221 F. 2d at 48) has not seen fit to give the necessary authorizations, possibly because of the difficulty in overcoming or complying with, constitutional safeguards in so doing.

Public Clearing House v. Coyne, 194 U. S. 497, is readily distinguishable as this court observed in Sunshine I supra. (221 F. 2d Footnote 9, p. 46), -- as is also Klaw v. Schaeffer, 151 F. Supp. 534, (appeal argued 2d Cir. January 10, 1958). There is no "prima facie" assumption here that appellant is conducting nothing but an unlawful business. Furthermore, in the opinion of some in a high position to judge, the doctrine of Public Clearing House, that the use of the mails is a privilege on which the government may impose such conditions as it chooses, is 'hoary dogma' -- (which) has long since evaporated." Dissent of Mr. Justice Harlan in Roth v. United States, 354 U. S. 476; 1 L. ed 2d 1518, Footnote 5. See cases cited there. See also Pike v. Walker, 73 App. D. C. 289, 121 F. 2d 37 Cert. denied 314 U. S. 625.

If Appellees' argument for reconsideration of the principle laid down by this court in the Sunshine I, Tourlanes and Oakley cases and recently followed in Glanzman v. Hinkle, 150 F. Supp. 823, (D. C. E. D. N. Y.) is worthy of consideration, then there is nothing left but to declare the statute unconstitutional as authorizing the Postmaster General to seize property without due process of law, and that it constitutes a prior restraint contrary to the First Amendment on future publication and distribution of all books and manuscripts owned by appellant, -- as the court indicated in Sunshine I, supra (221 F. 2d at page 48) would have to follow under any other than the court's construction of this statute. Appellees appear to have conceded that the cases cited above are stare decisis as to the instant case -- appellees seeking only to have the court change the principle involved, to meet the convenience of the administrators of the postal system. The Post Office Department has

many times sought power and authority from Congress in aid of policies and ideas developed in the Department which have been overturned by the courts, but Congress has not always been willing to concur. See United States v. Halseth 342 U. S. 277, 281, and dissent in Sunshine Book Co. v. Summerfield, U. S. App. D. C. , 249 F. 2d 114, 121, reversed per curiam order January 13, 1958; No. 587, Oct. Term 1957; US , 26 Law Week 3203.

The Post Office Department's bill which became Sect. 259a of Title 39 U. S. C. in 1950, was reported out by the Senate Committee of Post Office and Civil Service, in a report (Senate Report No. 2179) to accompany H. R. 8767; 81st Congress 2d Session) in which the only pertinent comment with respect to the need for, and purpose of, such legislation, is the statement that "- - the mails have been flooded with much unlawful and undesirable material of an obscene and lewd nature in an effort to use the mails in the sale and dissemination of this undesirable matter - -" (emphasis supplied). To the report was attached a letter of the Postmaster General recommending the adoption of his proposed legislation, -- but it is to be noted that in his analysis and statement of the purpose for which the legislation was sought, no mention whatsoever is made as to the "furnishing information" clause of the statute. The Postmaster General merely described his desire to be empowered to return to senders marked "unlawful" all mail addressed to persons, firms, corporations (etc.) engaged in obtaining remittances of money -- through the mails in exchange for obscene, lewd, lascivious (etc.) articles, matters, things (etc.) --". (see U. S. Code & Cong. Service 1950 p. 3007).

It is suggested that the Supreme Court's per curiam order reversing the decision of the majority of this court in the second Sunshine Book Co. v. Summerfield case, supra, on the authority of Roth v. United States,

2 Along with One, Inc. v. Olesen, No. 290 Oct. Term 1957, U.S. , 26 Law Week 3203; (case below reported 241 F. 2d 772 (CCA 9th)) -- both involving mail block orders of the department applied to magazines under the alleged authority of 18 U.S.C. 1461.

supra, places the dissenting opinion in much stronger focus.

It is therefore respectfully urged that, although appellees in their brief have no answer to the points raised by appellant as to the constitutional infirmities of the statute as applied, (appellant's brief, p. 18 et seq), the court now give consideration to the minority opinion in the second Sunshine Book Case, supra, as the prevailing authority, particularly the statement (249 F. 2d at page 121) that: "an administrative prior restraint not plainly authorized by statute, and not subject to specified standards and safeguards is of highly doubtful validity to say the least" (citing cases), and the observation at page 121: "--it is not clear at all that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power"[3], together with the reference that followed to Ex parte Jackson 96 U. S. 727, at page 736, that: "All that Congress meant by this (1873) Act was that the mail should not be used to transport such corrupting publications and articles." (Emphasis supplied). This pronunciation with respect to a similarly worded act involving the same subject matter even though referring to a criminal statute, applies with equal force to Section 259a of Title 39 U. S. C. That is actually the meaning of the latter as further indicated by its title: "Exclusion from mails of obscene, lewd, etc., articles---".

The answer seems to lie to some degree in Kingsley Books v. Brown, 354 U. S. 436. Mr. Justice Brennan, who wrote the majority opinion in Roth v. United States, supra, pointed out in his dissent in Kingsley Books that one of the standards for judging obscenity is the reaction of the "average" person and applying contemporary community standards and that a jury represents a cross-section of the community

3 See Paul and Schwartz, "Obscenity in the Mails: A comment on Some Problems of Federal Censorship", Vol.-106 U. of Pa. Law Review, p. 214, at page 236 where the authors express the opinion in analyzing the position of the individual justices of the Supreme Court as disclosed by Roth v. United States, supra, and Kingsley Books v. United States, 354 U.S. 436, that: "Thus, it is very possible that the announced views of five members of the Court, divergent as they may be, suggest the conclusion that postal censorship, as now practiced, is unconstitutional". For other references to judicial comment on postal censorship see: dissent of Mr. Justice Brandeis in U.S. ex rel. Milwaukee Social Club v. Burleson, 255 U.S. 407; Hannegan v. Esquire, 327 U.S. 146; Reilly v. Pinkus, 338 U.S. 269; dissent of Mr. Justice Harlan in Roth v. United States, 354 U.S. 476, 506, 507.

and has a special aptitude for reflecting the view of the average person. He then went on to say: "A statute which does not afford the defendant, of right, a jury determination of obscenity falls short -- (of) the necessary safeguards demanded by the freedoms of speech and press for material which is not obscene". The majority in Kingsley Books felt that the remedial scheme of the New York statute (the sole issue) was satisfactory -- involving as it did "adequate notice, judicial hearing and fair determination". The majority opinion further noted that any limitation of the protection of the First Amendment as to previous restraint, must "be so closely confined as to preclude what may fairly be deemed licensing or censorship". Thus it would appear that any limiting exceptions to the constitutional right are acceptable only when coupled with a right of determination in the judicial, not the executive, branch. It is further suggested, that Section 259a is not applicable to the present situation, for the reason that the action of the Post Office Department does not "exclude" or "bar" (see dissent in Sunshine II, supra) from the mails an obscene article. In the instant case the book can still be deposited in the mails and delivered to its destination without interference by the Post Office Department. What is actually "barred" (aside from the receipt of all mail matter addressed to appellant) is the private citizen's mail so addressed, same being returned to him libelously marked "unlawful", with a stigma thereby attaching to him for all who handle the letter to see, that he, the sender, is engaged in something "unlawful".

The statute therefore does not accomplish the intent of, or the purpose given for, its enactment, but without providing any standards or right to a judicial trial, gives sweeping power to an administrative official to impose severe punishment by destruction of a mail-order business. The statute is unconstitutional.

III

REPLY TO APPELLEES' CONTENTION THAT THE PROCEDURES FOLLOWED BY THE POST OFFICE DEPARTMENT ACCORD WITH DUE PROCESS OF LAW AND THE ADMINISTRATIVE PROCEDURE ACT.

(a) No one would be at a loss to understand the basis for appellant's contention that the only valid Rules of Practice in the Post Office Department, did not authorize an administrative appeal by the Solicitor from the Hearing Examiner's decision dismissing the complaint, if the applicable rules are read in context. Section 150.404 (App. 9) states succinctly that: "If the Chief Hearing Examiner shall determine that the complaint states facts sufficient to show the probable need for administrative action by the Postmaster General, he shall issue a notice of hearing to the respondent". Having control over the sufficiency of the complaint in the first instance, it can certainly be implied that the Hearing Examiner has the power to reject it for insufficiency after it is shown that complaint can't stand up on the evidence. After objection was made to the Solicitor's appeal from this rejection of the complaint, an attempt was made to nullify this delegation of final authority, by issuing new, but invalid[4] rules, in which (App. 11) this section was changed so as to remove this authority.

While it is true that Section 150.423 of the 1952 Rules and the non-published Rules of 1954, contain substantially the same language, yet sub-paragraph (e) thereof speaks solely in terms of an appeal by a respondent (App. 10, 13). This fact when considered in context with the following Section 150.424 (App. 10) providing for the publication in the Postal Bulletin of the Postmaster General's[5] order growing out of his decision on the appeal and the transmission of same to such employees as may be required to put said order in effect -- clearly indicates that

4 Because they were not published (See admission Appellant's Initial Brief S-1) in the Federal Register as required by the Administrative Procedure Act (5 U.S.C.1002)

5 This section (App. 13) of the later, non-published rules was changed to read Final Orders instead of Postmaster General's Orders. "Deputy Postmaster General" was substituted for "Postmaster General".

the drafters of the Rules intended only that a respondent would be allowed to appeal from an adverse decision of the Hearing Examiner. This contention is further strengthened when it is considered that if it had been intended that the prosecuting official could appeal and his appeal was unsuccessful, then the mandate for publication and transmission of an order dismissing the complaint, would be ridiculous.

Furthermore, if allowed to carry an appeal forward, instead of bringing a new and sufficient complaint,[6] what would be the position of the Solicitor if the appellate officer affirmed? Certainly the contesting Solicitor could not, then seek judicial review. Cf. Lee v. C. A. B. 96 App. D. C. 299, 225 F. 2d 950.

(b) The cases cited by appellees in support of their contention that the admitted action of the Deputy Postmaster General in this proceeding was under a valid delegation of authority from the Postmaster General, notwithstanding the prescription of Section 259a, Title 39 U. S. C. ("upon evidence satisfactory to the Postmaster General") -- are not in point.

There is no question but what ministerial duties involving the management and business affairs of the Post Office Department may be delegated to assistants, including the hiring and firing of employees. But the Reorganization Plan of 1949 authorized by Congress does not give authority to delegate quasi-judicial powers and authority, specifically entrusted by Section 259a to the Postmaster General, and no delegation or sub-delegation thereof is valid without the express consent of Congress. Furthermore the Reorganization Plan was in effect at the time of passage of Section 259a, and the fact that Congress in the latter designated the Postmaster General as the sole authority without exception or qualification, clearly indicates that Congress had no intention of authorizing a delegation of that authority or to bring the authority

6 See page 9, ante, on point that Solicitor's appeal was nothing more than a new and invalid complaint to a de facto tribunal.

within the meaning of the Reorganization Plan. Otherwise Congress would have said so, if it intended the Reorganization Plan authority to apply. While no cases have been found directly on the point, yet by analogy the cases cited by appellant in its initial brief, support this contention.

(c) Appellees while admitting that the changed 1954 Rules of Practice were not published as required by law, insists that publication makes no difference if the party got a copy. But the fact is overlooked that the invalid rules changed Section 259a by substituting the Deputy Postmaster General for Postmaster General and under the terms of the Administrative Procedure Act (5 U.S.C. 1002),if no person is required to resort to non-published procedures and organizations it would certainly seem, that if, over objection, he is compelled to follow such procedures and organization, any action under non-published rules whose provisions have been changed from the existing rules, after there has been a complete adjudication, -- would be a nullity. Otherwise this proscription of the Administrative Procedure Act would be meaningless. Appellant's citations on this point are persuasive. The single case cited by appellees while not involving the Administrative Procedure Act, still by analogy, supports appellant's position, for therein, (Borak v. Biddle, 78 U.S. App. D.C. 374, 141 F.2d 278, 280) this court held that: "If an agency could -- make it (a regulation) valid from the date of its adoption by informing a person about it at a subsequent time when his legal rights had been invaded, the result would be to destroy the protection contemplated and intended by Congress and make the safeguards -- wholly illusionary".

(d) Appellant of course has no way of establishing by evidence to the satisfaction of appellee, as to when and how the Solicitor and the Deputy Postmaster General, had a private conference on this matter, if they did. But the fact remains that the Solicitor: "is charged with the duty of giving opinions to the Postmaster General and the heads of the several bureaus and offices of the Department upon all questions of

law arising upon the interpretation and construction of laws - - with the preparation and submission (with advice) to the Postmaster General of all appeals to him from the heads of the bureaus and offices of the Department upon questions of law -- Supervision of all proceedings -- arising out of the enforcement of the postal fraud, lottery and ficititious statutes and with making recommendations to the Postmaster General relative to the issuance of orders pursuant to the provisions of such laws", 39 C. F. R. Sect. 1.9 (h).

Here, the Office of Hearing Examiners is an "office" of the Department; the Solicitor performed prosecuting functions before that office; prepared and submitted his own appeal from that "office" to the Postmaster General with a recommendation (advice) that notwithstanding the Hearing Examiner's decision, a mail stoppage order be issued. (See original record: Solicitor's appeal to Postmaster General, p. 28).

(e) Appellant feels that there is no need to offer further support for its contentions with respect to the weight to be given the Hearing Examiner's decision, other than to point out that appellees have taken out of context the partial finding of the Examiner as to appellant's attempt to obtain remittances through the mail. There is no justification for appellees' reliance on such a partial statement, for it is conceded that the advertisement carries an order blank to which can be attached the remittance, or the order can be C. O. D. But the basic fact to be considered in context, is that there is no obscene book involved and certainly appellees are mistaken when they state (Brief p. 20): "in the light of the evidence showing that appellant was causing information about obscene matter to be deposited in the mails was more than sufficient to sustain the final departmental decision". That there was no such evidence, has previously been pointed out herein.

(f) Notwithstanding appellees contention to the contrary, res judicata or equitable estoppel, does apply. The subject matter of the previously adjudicated case, was identical with that in the instant case, namely the advertising of the book. The phraseology of the advertise-

ment was substantially the same in both cases.[7] The cases cited by appellant clearly establish that even where there are two different statutes involved, leading to different results in such a case, the prior adjudication governs. Churchill Tabernacle v. Federal Communications Commission, 81 U.S. App. D.C. 411, 160 F.2d 244, cited by appellees, is distinguishable on the facts. In the present case, there was no contract, and no license involved. There was no administrative approval by the Post Office Department of a contract in the first instance, followed later by an inconsistent change in policy. This court noted that the doctrine does not ordinarily apply to decisions of administrative agencies although the reasoning in this respect may be tenuous. Furthermore the principal Supreme Court cases relied on by the Court on this point, are also readily distinguishable on the facts, involving as they do no judicial or quasi-judicial prior adjudication, such as exists in the instant case. Likewise the two other later cases in this court reiterating the Churchill Tabernacle doctrine (Niagara Mohawk Power Corp. v. Federal Power Commission, 91 U.S. App. D.C. 395, 202 F.2d 190 and Jason v. Summerfield, 94 U.S. App. D.C. 197, 214 F.2d 273 differ materially from a factual standpoint with the situation here. Niagara Power was concerned with the question as to whether failure of a party to apply for rehearing or to further proceed, constituted a waiver of any question of the legal conclusions involved, when a new case arose. Jason involved the authority of the Postmaster General to remove an employee for doubt as to loyalty in a second review Board proceeding, after the Board in an earlier proceeding had found that reasonable grounds did not exist for belief that the person involved is disloyal. It is apparent that ministerially an employee's present conduct must be judged in the light of present circumstances, not what was the situation earlier, if the intent of the Executive Order was to be carried out. New interim facts were involved, not the same identical subject matter as here.

---

7 See discussion p. 8, ante.

CONCLUSION

It is further respectfully urged that, if for no other reason, appellant is entitled to prevail on the grounds of stare decisis on the basis of the Supreme Court's action in reversing (26 Law Week 3203) this court in the second Sunshine Book Co. v. Summerfield case (U.S. App. D.C. , 249 F.2d 114), and the final decision of this court in the first Sunshine Book Co. case (95 U.S. App. D.C. 169, 221 F.2d 42, Cert. denied 349 U.S. 921).

Respectfully submitted,

HORACE J. DONNELLY, JR.
730 - 15th Street, N.W.
Washington, D. C.
Attorney for Appellant

BRIEF FOR APPELLEES

United States Court of Appeals
For the District of Columbia Circuit

No. 14,205

CADILLAC PUBLISHING COMPANY, INC., *Appellant*

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,
Appellees

On Appeal From the United States District Court for the District of Columbia

GEORGE COCHRAN DOUB,
Assistant Attorney General,

OLIVER GASCH,
United States Attorney,

SAMUEL D. SLADE,
HOWARD E. SHAPIRO,
Attorneys,
Department of Justice,
Washington 25, D. C.

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN - 6 1958
Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

In the opinion of appellees the questions presented are:

1. Whether the "unlawful" order issued by the Post Office Department is supported by substantial evidence.

2. Whether appellant can evade the civil sanctions of 39 U.S.C. 259a by combining its legal and illegal activities.

3. Whether the procedures followed by the Post Office Department in this case accord with due process of law and the Administrative Procedure Act.

INDEX

Page

Questions presented i

Counterstatement of the case 1

Statute involved 6

Summary of argument 7

Argument:

I The "Unlawful" Order Issued by the Post Office Department is Supported by Substantial Evidence 10

II Appellant Cannot Evade the Civil Sanctions of 39 U.S.C. 259a by Combining Its Legal and Illegal Activities 14

III The Procedures Followed by the Post Office Department Accord With Due Process of Law and the Administrative Procedure Act 17

Conclusion 22

CITATIONS

CASES:

Borak v. *Biddle*, 78 U.S. App. D.C. 374, 141 F. 2d 278 19

Brown v. *Allen*, 344 U.S. 443 17

Cadillac Publishing Co. v. *Summerfield*, 97 U.S. App. D.C. 14, 227 F. 2d 29, certiorari denied, 350 U.S. 901 5

Churchill Tabernacle v. *Federal Communications Commission*, 81 U.S. App. D.C. 411, 160 F. 2d 244 ..... 9, 21

Donaldson v. *Read Magazine Inc.*, 333 U.S. 178 ..... 8, 14, 16

Farley v. *Simmons*, 69 App. D.C. 110, 99 F. 2d 343 (C.A.D.C.) certiorari denied, 305 U.S. 651 ..... 8, 12, 21

Glanzman v. *Schaffer*, 130 F. Supp. 824 (D.C.E.D.N.Y.) 14

Hargett v. *Summerfield*, ... U.S. App. D.C. ...., 243 F. 2d 29, certiorari denied, 353 U.S. 970 18

Jackson, Ex parte, 96 U.S. 727 15

Jason v. *Summerfield*, 94 U.S. App. D.C. 197, 214 F. 2d 273, certiorari denied, 348 U.S. 840 21

Klaw v. *Schaffer*, 151 F. Supp. 534, pending on appeal, C.A. 2, No. 24,778 ..... 12, 16

Kuhn v. *Civil Aeronautics Board*, 87 U.S. App. D.C. 130, 183 F. 2d 839 ..... 8, 14

M'Collum v. *United States*, 17 C. Cls. 92 18

Moroney v. *Abrams*, ... U.S. App. D.C. ...., 244 F. 2d 21, certiorari denied, *sub nom. Moroney* v. *McKibben*, No. 339, October Term, 1957 19

Niagara Mohawk Power Corp. v. *Federal Power Commission*, 91 U.S. App. D.C. 395, 202 F. 2d 190, affirmed 347 U.S. 239 21

Page

N.L.R.B. v. *Greater New York Broadcasting Corp.*, 147 F. 2d 337 (C.A. 2) 14
N.L.R.B. v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 .....8, 14
Oakley v. *Summerfield*, 98 U.S. App. D.C. 22, 231 F. 2d 775, certiorari denied, 352 U.S. 912 14
Olesen v. *Stanard*, 227 F. 2d 785 (C.A. 9) 11
Public Clearing House v. *Coyne*, 194 U.S. 497 .....8, 15
Summerfield v. *Sunshine Book Co.*, 95 U.S. App. D.C. 169, 221 F. 2d 42, certiorari denied, 349 U.S. 921 .....8, 14, 15, 16
Tourlanes Publishing Co. v. *Summerfield*, 98 U.S. App. D.C. 20, 231 F. 2d 773, certiorari denied, 352 U.S. 912 14
United States v. *Carver*, 260 U.S. 482 17
United States v. *Harriss*, 347 U.S. 612 .....8, 17
United States v. *Hornick*, 229 F. 2d 120 (C.A. 3) 8, 11
United States v. *Rebhuhn*, 109 F. 2d 512 (C.A. 2) 10
United States v. *Warfield*, 170 Fed. 43 (C.A. 4) 18
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 20
Wong Yang Sung v. *McGrath*, 339 U.S. 33 20

CONSTITUTION, STATUTES AND REGULATION:

Constitution of the United States:
First Amendment 5
Fifth Amendment 5
Administrative Procedure Act:
Section 5, (5 U.S.C. 1004(c)) 9, 19
Section 8, (5 U.S.C. 1007a) 9, 20
18 U.S.C. 1461 11
39 U.S.C. 259a (Act of August 16, 1950, 64 Stat. 451) 1, 2, 6, 7, 10, 11, 12, 13, 14, 17, 18
Post Office Department Rules of Practice in Proceedings under the Administrative Procedure Act:
Section 150.422(c) 20
Section 150.423 .....17, 18

MISCELLANEOUS:

American Law Institute, Model Penal Code Tentative Draft No. 6, Sec. 207-10 10
17 F.R. 9983 19
Reorganization Plan No. 3 of 1949, Section 1(b), 63 Stat. 1066 .....9, 18

United States Court of Appeals
For the District of Columbia Circuit

No. 14,205

CADILLAC PUBLISHING COMPANY, INC., *Appellant*

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

and

MAURICE H. STANS,
Deputy Postmaster General of the United States,
Appellees

On Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal by the Cadillac Publishing Co., plaintiff below, from an order of the District Court (Holtzoff, J.), (App. 69) granting summary judgment for the defendants below, the Postmaster General and Deputy Postmaster General, in appellant's suit to enjoin the enforcement of a postal "unlawful" order issued by defendants under 39 U.S.C. 259a (App. 149). The "unlawful" order is

based upon findings by Deputy Postmaster General Maurice H. Stans that appellant is receiving remittances of money through the mails for obscene matter, and is causing information to be deposited in the mails as to where, how and from whom obscene matter may be obtained (App. 141). Under the terms of the "unlawful" order, all incoming mail addressed to appellant except mail which on its face appears to be unconnected with the unlawful activity, is returned to the sender or sent to the dead letter office marked "unlawful".

a) *The Administrative Complaint and Answer.* The proceedings against appellant in the Post Office Department were commenced on February 24, 1953, when the Acting Solicitor of the Post Office Department filed a complaint charging appellant with violation of 39 U.S.C. 259a. The complaint alleged that appellant was obtaining and attempting to obtain remittances of money through the mails for a publication entitled the "Illustrated Encyclopedia of Sex" by placing advertisements describing said publication in an erotic and suggestive manner in certain obscene, lewd and lascivious publications. The complaint specified the names of these publications and the particular numbers concerned (App. 71-73). Appellant responded to the complaint. Its answer, as finally amended, denied the allegations of the complaint; challenged its legal sufficiency under 39 U.S.C. 259a; objected to the proceedings as not being in conformity with the requirements of due process, and the Administrative Procedure Act; raised a defense of *res judicata,* based on a prior proceeding in the Post Office Department in which it had prevailed; and urged equitable estoppel on the ground that the magazines named in the complaint had been entered as second class mail matter, and that the magazines and publications in which appellant advertises "The Illustrated Encyclopedia of Sex", were being accepted for mailing by the Post Office at New York, New York (App. 73-75).

b) *Proceedings before the Hearing Examiner.* After a number of continuances, (App. 133), the cause came on for hearing before Edward Carlick, a hearing examiner, on June 16, 1953. Appellant appeared by counsel.

At the outset of the proceedings the Solicitor moved to amend the administrative complaint so as to supplement the list of magazines named therein to include similar publications and later issues of the named magazines (App. 847). The Solicitor then offered advertisements for the "Illustrated Encyclopedia" clipped from the various magazines named or referred to in the complaint. The source of the advertisements was identified by a Postal Inspector, who testified that most of them had been obtained from newsstands but that some were obtained through the mails (App. 89). Examination by counsel for appellant established that the magazines received through the mails were *Night and Day, Headquarters Detective,* and *Our World.* The examiner refused to admit in evidence single pages containing advertisements for the Encyclopedia; only whole publications were accepted (App. 92). The Solicitor subsequently offered other whole publications (App. 98, 100, 102) with evidence that they had been declared nonmailable as containing obscene matter (App. 99, 100).

Appellant offered in evidence the record of prior proceeding against it, and a collection of statements by persons who had ordered the book by mail in response to appellant's advertisements. These matters were rejected as irrelevant (App. 106, 108). It then offered, and the examiner admitted, a letter from a person under twenty-one years of age ordering the Encyclopedia. Also admitted was Cadillac's reply advising that the book was not sold to minors without written consent of their parents (App. 109, 110).

Appellant then presented the testimony of Max Shapiro, president of Cadillac Publishing Co. Mr. Shapiro's testimony described Cadillac's methods of doing business. Advertisements for the "Illustrated Encyclopedia" are composed and placed in various magazines and newspapers

by an advertising agency, Waterston & Freid (App. 112, 123). The form of the ad, however, is approved by Cadillac (App. 123). Each published advertisement for the "Illustrated Encyclopedia" includes an order blank which can be cut from the magazine in which the advertisement appears. On each order blank is printed a code number which identifies the issues of the magazine in which it appears (App. 116). On the order blank there also appears a statement, to be filled in by the purchaser, that "I am over 21" (App. 125). Mr. Shapiro admitted that Cadillac fills any order accompanied by the purchase price and a coupon stating that the purchaser was over twenty-one (App. 126). Ads for the Encyclopedia appear in publications ranging from newspapers of general circulation to such magazines as *Sales Opportunity* and *Ebony* (App. 116-120). The format of the advertisement varies with the policies of the media in which it appears—some magazines censor its content (App. 120, 132).

c) *Hearing Examiner's Initial Decision.* On October 29, 1953 the Hearing Examiner issued his initial decision. The Examiner ruled that the Solicitor had failed "to set forth facts sufficient to constitute a violation of the invoked statute, and to establish upon substantial evidence that the respondent is obtaining or attempting to obtain remittances of money through the mails for an obscene, lewd, lascivious and indecent article as charged in the complaint". The Examiner ruled that he could not find the Encyclopedia to be obscene when it was not in evidence before him. He did not consider whether the proof established that appellant had been causing information to be deposited in the mails as to where, how and from whom obscene matter may be obtained.

d) *Appeal to the Deputy Postmaster General.* The Solicitor appealed from this decision to the Deputy Postmaster General, relying upon rules of practice under the Administrative Procedure Act then in effect (App. 9). Appellant moved to dismiss this appeal upon the ground that, under the rules, an appeal from a Hearing Examiner's

decision is available only to a respondent. This motion was denied by the Deputy Postmaster General on February 15, 1954 (App. 140). Appellant sought to enjoin the Post Office Department from considering the Solicitor's appeal; this Court affirmed the judgment of the District Court denying such relief in *Cadillac Publishing Co.* v. *Summerfield,* 97 U.S. App. D.C. 14, 227 F. 2d 29, certiorari denied 350 U.S. 901. Further administrative proceedings were postponed until the completion of that litigation although, under objection, appellant filed its brief in answer to the Solicitor's brief on appeal (App. 5).

On June 28, 1957 the Deputy Postmaster General issued a final departmental decision. He ruled that the character of the advertisements for the Encyclopedia was such that the book would be obscene when read by persons responding to such advertisements. He further held, based upon the facts developed in the proceeding before the Hearing Examiner, that appellant was causing information to be deposited in the mails as to where, how and from whom obscene matter may be obtained. This determination is based upon evidence that several of the magazines in which advertisements for the Encyclopedia appeared were circulated through the mails. On the same day the Deputy Postmaster General issued an "unlawful" order forbidding the Postmaster at New York, New York to pay any postal money order drawn to the order of Cadillac Publishing Co. Inc., and directing him to return to the sender all letters and other mail addressed to Cadillac with the word "unlawful" stamped thereon, except mail which on its face appears to be unconnected with the illegal activity (App. 149).

e) *Proceedings in the District Court.* Appellant commenced this action by a complaint filed in the District Court on July 3, 1957 alleging that the action of the Postmaster General and his subordinates in issuing the "unlawful" order was in violation of the First and Fifth Amendments, and that the procedures leading to the issuance of the order were in violation of the Administrative Procedure

Act and due process of law; it prayed for a judgment declaring the "unlawful" order to be null and void and an injunction restraining the Postmaster General and his subordinates from carrying out its provisions (App. 2-8). Appellees filed an answer to the complaint on August 30, 1957. By stipulation executed July 15, 1957 it was agreed between the parties that mail addressed to appellant may be opened by one of its employees in the presence of a representative of the Post Office Department, and that all mail pertaining to advertisements for the "Illustrated Encyclopedia of Sex" in response to advertisements of the type classified by the Post Office Department as "sexy" shall be withheld from delivery. All other mail matter so examined was to be delivered to appellant.

The parties filed cross motions for summary judgment (App. 32, 34). Appellee's motion was supported by an exhibit constituting the administrative record in the Post Office Department (App. 71, 150).

The District Court (Holtzoff, J.) issued its decision granting appellee's motion for summary judgment on October 4, 1957. The Court held that the order was valid under the provisions of 39 U.S.C. 259a forbidding the deposit of information in the mails as to where, how and from whom an obscene publication may be obtained. It further ruled that appellant's objection to the delegation of authority by the Postmaster General to the Deputy Postmaster General, and its objection that the Solicitor had no right to secure a review of the Hearing Examiner's decision, are both untenable (J.A. 66, 69).

STATUTE INVOLVED

39 U.S.C. 259a (Act of August 16, 1950, 64 Stat. 451) provides as follows:

> Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things, or substances.
>
> Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any

kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes.

SUMMARY OF ARGUMENT

I

The "unlawful" order issued by the Post Office Department is supported by substantial evidence. We do not urge the validity of the finding that appellant was obtaining money for obscene matter, since the book held to be obscene was not before the Post Office Department. But the evidence shows plainly that appellant was causing information to be deposited in the mails as to where, how and from whom obscene matter may be obtained. 39 U.S.C.

259. Cf. *United States* v. *Hornick,* 229 F. 2d 120. It caused such information to be deposited in the mails by advertising its publication, "The Illustrated Encyclopedia of Sex"as if it were an obscene book, in magazines which circulate through the mails. Appellant is responsible for the character of its ads and the character of the media in which they appear. *Farley* v. *Simmons,* 69 App. D.C. 110, 99 F. 2d 343, 345. Nor can appellant complain that the "depositing information" count was not charged in the administrative complaint. Variance between pleadings and proof in administrative proceedings does not invalidate the final administrative decision. *N.L.R.B.* v. *MacKay Radio & Telegraph Co.,* 304 U.S. 333, 349-351; *Kuhn* v. *Civil Aeronautics Board,* 87 U.S. App. D.C. 130, 183 F. 2d 839.

II

The fact that appellant has combined legitimate publishing activities with its illegal activity does not permit it to avoid the civil sanctions imposed by Congress. The rule announced by this Court in *Summerfied* v. *Sunshine Book Co.,* 95 U.S. App. D.C. 169, 221 F. 2d 42, certiorari denied, 349 U.S. 921, that "unlawful" orders must be confined to the illegal activity should be reconsidered. Where a rational basis for restricting an "unlawful" order exists, the Post Office Department must restrict it to mail covering the illegal activity. Cf. *Donaldson* v. *Read Magazine Inc.,* 333 U.S. 178. But where legal and illegal activities are inseparably merged, so that no practical means exists to stop mail delivered to the illegal activity, then the burden is upon the party abusing the mails to come forward with a practical basis for separating legitimate mail from illegal mail. *Public Clearing House* v. *Coyne,* 194 U.S. 497, 510. Any other construction of the statute results in complete frustration of the purposes of Congress. Even the avoidance of difficult constitutional problems does not permit this. *United States* v. *Harriss,* 347 U.S. 612, 623.

III

The procedure adopted by the Post Office Department accorded with due process of law and the Administrative Procedure Act. Regulations in effect at the time of the Solicitor's appeal from the Hearing Examiner's decision in favor of appellant, authorized "any party of record" to appeal from an adverse decision. The fact that this appeal was not personally considered by the Postmaster General does not invalidate the final decision, since Congress has authorized the Postmaster General to delegate any of his functions. 63 Stat. 1066. Nor is the fact that regulations modifying the appeal procedure were not published in the Federal Register of significance here. Appellant was personally served with copies of the amended regulations and was not prejudiced in any way by the procedural changes. Nor was it prejudiced by the fact that the Solicitor, the legal adviser to the Postmaster General, was the complainant in the administrative proceedings. Section 5 of the Administrative Procedure Act forbids employees, engaged in prosecuting or investigating functions, from advising in any case in which they have performed such functions. But the record here disclosed no evidence that such advice was given in this case. Equally without merit is appellant's contention that the Deputy Postmaster General erred by disregarding the Hearing Examiner's conclusions. An examiner's decision is only a recommendation under Section 8 of the Administrative Procedure Act until it is adopted as the final agency decision. Finally, appellant's contention that the administrative proceeding against it is barred by *res judicata* is without support. This Court has squarely held that *res judicata* and equitable estoppel do not apply in administrative proceedings. *Churchill Tabernacle* v. *F.C.C.*, 81 U.S. App. D.C. 411, 160 F. 2d 244.

ARGUMENT

I

The "Unlawful" Order Issued by the Post Office Department Is Supported by Substantial Evidence

(a) As the opinion by the District Court shows, the "Government concedes that the book, itself, is not obscene . . ." (App. 67). A book dealing with sex which is not obscene when sold as a legitimate scientific work may be obscene when it is sold by advertisements plainly designed to catch the prurient and by direct appeals to the salaciously disposed. *United States* v. *Rebhuhn,* 109 F. 2d 512, 514-515. In this case, however, the book itself was not before the Post Office Department to be considered in conjunction with the advertisements which the Post Office Department found to be addressed to persons morbidly interested in sex. While we believe that a book which is not obscene *per se* may be obscene when advertised principally in publications pandering to prurient interest (cf. American Law Institute, Model Penal Code Tentative Draft No. 6, Sec. 207-10) we do not understand the District Court's opinion to affirm the Post Office finding that the book is obscene on this ground. There is adequate support for the "unlawful" order here involved in the other findings of the Post Office Department. We do not, therefore urge the validity of the finding that the appellant was obtaining remittances of money through the mails for obscene matter.

(b) The statute under which the Deputy Postmaster General acted not only permits the issuance of "unlawful" orders upon evidence that a business is obtaining money for obscene matter, but also permits such orders when the respondent "is causing to be deposited in the United States mails, information as to where how or from whom" obscene matter may be obtained. 39 U.S.C. 259a. The quoted words of the statute condemn the advertisement of obscenity through the mails, whether the merchandise actually delivered is obscene or not. Thus, if a dealer in salacious matter causes advertisements to be circulated

through the mails which simply state "Men! Order Obscene Materials from Us!" such advertisements, of themselves, form a valid basis for the issuance of an "unlawful" order.

The record in this case firmly establishes that petitioner was advertising the "Illustrated Encyclopedia" in magazines which circulate through the mails (App. 90). Indeed the evidence of this fact was developed by counsel for appellant in examining the Postal Inspector who identified the advertisements (App. 90). The advertisements from these magazines, which speak for themselves, plainly promise the purchaser an obscene publication. This, we submit, is a sufficient basis for the issuance of an "unlawful" order under the plain language of 39 U.S.C. 259a.

Appellant urges that the case of *Olesen* v. *Stanard*, 227 F. 2d 785 (C.A. 9) shows that the merchandise itself must be in evidence before a finding of "depositing information" may be made. But in that case, unlike this one, the Government had conceded that the advertisements deposited in the mail "did not violate the statute under which the Postmaster General had assumed to act . . ." 227 F. 2d 785, 787. The Court of Appeals for the Ninth Circuit was not called upon to decide whether, if the advertisements involved had offered obscene matter, an "unlawful" order could properly issue under the statute. This question was recently considered under a similarly worded statute, 18 U.S.C. 1461, which condemns the mailing of matter "of any kind giving information directly or indirectly where or how or from whom or by what means . . ." obscene matter may be obtained. In construing this language, the Court of Appeals for the Third Circuit held (*United States* v. *Hornick*, 229 F. 2d 120, 122):

> The statute says "advertisement * * * giving information." The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information

> for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape.

The same result has been reached under 39 U.S.C. 259a in *Klaw* v. *Schaeffer,* 151 F. Supp. 534, pending an appeal, C.A. 2, No. 24,778. The principles of the *Hornick* and *Klaw* cases are clearly applicable here.

Appellant's advertisements for the "Illustrated Encyclopedia of Sex" were plainly couched in terms which promised an obscene publication. By placing such advertisements in magazines which circulate through the mails, appellant is, in the words of the statute, "causing to be deposted in the United States mails, information as to where, how or from whom [obscene matter] may be obtained". It is consequently subject to the civil sanctions established by Congress to purge the mails of such matter.

Appellant urges that there is no evidence to show that it was responsible for the mailing of the magazines containing its advertisements. This argument presupposes an extraordinary naivety about business relations between an advertiser and the media it selects. Appellant's advertisements were prepared and placed by an advertising agency. But appellant approved them, paid for them, and apparently continued them in the various magazines which they appeared because it was profitable for it to do so (App. 123-125). Thus appellant cannot escape responsibility for its advertising simply because it was under the control of an advertising agency. Nor can it escape responsibility for the fact that the advertising media it selected circulated through the mails. This Court has noted that an advertiser may be responsible for the contents of the publications in which he advertises (*Farley* v. *Simmons,* 99 F. 2d 343, 345, certiorari denied 305 U.S. 651):

> It is fairly to be inferred that one operating a business knows the nature of the contents of an advertising medium chosen by him. But quite apart from this, it was without dispute that the appellee did place his advertisements in the magazines in question and that

> they did contain the other contents alluded to. The appellee was therefore bound by the consequences of his choice of magazines, whether or not he had knowledge in advance of publication as to the contents thereof.

Similarly appellant is chargeable with knowledge of the fact that the magazines in which it advertises its book on sex circulate through the mails. Appellant should have been aware of this when it approved advertisements for the "Illustrated Encyclopedia" which represent the book as if it were obscene. Indeed, appellant's answer to the administrative complaint urged that many of the magazines in which it advertised circulate through the mails and that the Post Office Department was therefore estopped from proceeding against it. (App. 74-75); it cannot disclaim responsibility for the fact that its advertisements circulated in the mails.

39 U.S.C. 259a imposed an affirmative duty upon appellant, as an advertiser using the mails, not to cause information to be deposited therein which describe where obscene merchandise might be obtained. Nevertheless, appellant advertised its book on sex in terms directly appealing to prurient interests. The very delicacy of the subject of its "Encyclopedia" should have put appellant on notice of the need for circumspection in its advertising. Yet such was the nature of its advertisements, that some publications in which appellant advertised the "Encyclopedia" felt obliged to censor them (App. 120-132). We submit that on this record the evidence of appellant's advertising practices clearly supports an "unlawful" order based upon the finding that it was causing information to be deposited in the mails as to where, how and from whom obscene matter may be obtained.

(c) Apart from the foregoing, appellant contends that the final order against him is invalid because the offense of causing the deposit of information in the mails about where obscenity may be obtained was not charged in the administrative complaint. But it is a familiar rule that a variance between pleadings and proof in administrative

proceedings do not invalidate the final administrative action if the respondent was on notice of the substance of the charges. *N.L.R.B.* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 349-351; *Kuhn* v. *Civil Aeronautics Board*, 87 U.S. App. D.C. 130, 183 F. 2d 839; *N.L.R.B.* v. *Greater New York Broadcasting Corp.*, 147 F. 2d 337 (C.A. 2). Apellant had full notice of the grounds upon which the Solicitor sought a reversal of the hearing examiner's order—including the charge that the proof established that it was advertising obscenity through the mails. Under the decision in *MacKay Radio* and similar cases therefore, it has no basis, for complaining that the "giving information" offense was not charged in the original complaint.

II

Appellant Cannot Evade the Civil Sanctions of 39 U.S.C. 259a by Combining Its Legal and Illegal Activities

Appellant contends that grave constitutional questions have arisen from the stop order against its incoming mail. It argues that 39 U.S.C. 259a must be construed to limit the order to the particular activity held to be unlawful in order to avoid these problems. *Summerfield* v. *Sunshine Book Co.*, 95 U.S. App. D.C. 169, 221 F. 2d 42, certiorari denied 349 U.S. 921; *Tourlanes Publishing Co.* v. *Summerfield*, 98 U.S. App. D.C. 20, 231 F. 2d 773, certiorari denied 352 U.S. 912; *Oakley* v. *Summerfield*, 98 U.S. App. D.C. 22, 231 F. 2d 775, certiorari denied 352 U.S. 912; cf. *Glanzman* v. *Schaffer*, 130 F. Supp. 824 (D.C.E.D. N. Y.).

We can see no meaningful distinction between the stop order in this case and the orders involved in the *Sunshine-Tourlanes-Oakley* cases. But, there are substantial reasons why the principle of those cases should be reconsidered.

The *Sunshine* doctrine is based upon this court's interpretation of the Supreme Court's decision in *Donaldson* v. *Read Magazine Inc.*, 333 U.S. 178. Judge Washington's opinion recognized that "the issue as to the validity of the Postmaster General's order in *Read Magazine* was not squarely decided", but noted despite this, that "the attitude of the Court indicates strongly that orders under Section 259 must be limited to those activities of a defendant

which are unlawful . . ." 95 U.S. App. D.C. 169, 173, 221 F. 2d 42, 46.

We submit that the analysis in *Sunshine* did not fully consider the crucial fact underlying the issues presented in *Read*. On the record before the Supreme Court, it was plain that a simple and practical means existed by which the Postmaster General could limit his order against Read Magazine to the particular activities held to be illegal: only mail addressed to the Contest Editor of Read Magazine in his official capacity was connected with the fraudulent activitiy. In that situation, the burden was upon the Postmaster General to limit his order lest it should exceed the limits of reasonable connection with its unlawful objective—the fraudulent contest scheme.

The test applied by the Supreme Court is the test which should be applied here: Is there a reasonable and practical basis for limiting the stop order? If there is, then the order must be limited just as it was limited in the *Read* case.

In many situations, however, an illegal mail order business is deliberately organized to combine legal and illegal activities so that they are inseparable. Mail concerning the fraudulent or unlawful activities must then be sent to the same address as innocuous letters. Since first-class mail cannot be opened by the Post Office Department, (*Ex parte Jackson,* 96 U.S. 727, 733) there is no way in which civil sanctions can be applied against mail concerning the inseparable illegal activity. In this situation the burden shifts to the respondent in the administrative proceeding to come forward with a practicable means for separating mail concerning its illegal activities from mail concerning its legitimate functions. The simplest way, of course, is for the respondent to suspend the illegal activity. This practical, common-sense approach is clearly indicated by the Supreme Court's decision in *Public Clearing House* v. *Coyne,* 194 U.S. 497, 510:

> Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal

> or domestic character, and having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, *prima facie* at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annullment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.

The *Coyne* case was distinguished in *Sunshine* on the ground that it involved "conduct of what was solely an illegal business". (95 U.S. App. D.C. 169, 173, 221 F. 2d 42, 46, at fn. 9). Yet the Supreme Court's opinion in that case recognized that some mail having no connection with the prohibited activity was barred. To afford such mail the protection to which it is entitled under the Constitution, and yet to avoid nullification of the law, the Supreme Court permitted the Post Office Department to treat all the plaintiff's mail as *prima facie* identified with the illegal business. The burden of coming forward with a practical basis for effectively limiting the stop order was transferred to the business whose mail had been stopped.

The rule of *Coyne,* which was reaffirmed in *Donaldson* v. *Read Magazine Inc.,* is the appropriate principle to apply in this case. Constitutional doubts which would arise if the Post Office Department ignored a rational basis for limiting its order are not present when there is no such basis. See *Klaw* v. *Schaffer,* 151 F. Supp. 534, 537, appeal pending, C.A. 2 No. 24,778.

No other construction of the statute is possible without utterly frustrating the purpose of Congress in providing a civil remedy against the use of the mails for the sale of obscenity. It is a simple matter for a business profiting from prurience to include a few innocuous items in its list of entertainments. It is a simple matter—and a strong temptation in the light of the profits available—for publishing houses to offer a few titles as if they were highly salacious. By thus combining legitimate with illegitimate activities 39 U.S.C. 259a can be very easily avoided and its civil sanctions rendered nugatory. The *Coyne* case teaches that this is not to be permitted.

We submit that it is no answer to this problem to state that the practical consequences must be left to Congress. The Supreme Court has warned that even in construing statutes to avoid constitutional problems the courts "must also avoid a construction that would seriously impair effectiveness of the Act in coping with the problem it was designed to alleviate", *United States* v. *Harriss,* 347 U.S. 612, 623. These considerations are clearly controlling here.[1]

III

The Procedures Followed by the Post Office Department Accord With Due Process of Law and the Administrative Procedure Act

(a) Appellant's complaint against the procedures followed in this case stem from its construction of the regulations permitting an appeal from the hearing examiner's decision. The regulations in effect at the time of the hearing examiner's initial decision provided (App. 10):

> Sec. 150.423. Appeal from Initial Decision. (a) Any party of record in a proceeding, except those who failed to answer the complaint or having answered fail to appear at the hearing, may file a notice of

[1] Nor is the denial of certiorari by the Supreme Court in *Sunshine, Tourlanes* and *Oakley* an indication of approval of the rule there presented. The Supreme Court has warned many times that the denial of certiorari means no more than that certiorari is denied. It is not an indication of approval of the merits of any decision denied review. *Brown* v. *Allen,* 344 U.S. 443, 492; *United States* v. *Carver,* 260 U.S. 482, 490.

> intention to appeal to the Postmaster General in accordance with paragraph (b) hereof.

Despite this plain language, appellant insists that the regulation did not authorize an appeal by the Solicitor from the hearing examiner's adverse ruling. We are at a loss to understand the basis for this contention. The regulation states that any "party of record" may appeal. The proceeding before the hearing examiner was adversary, and the Solicitor was a party of record. As a party, the Solicitor had as much right to appeal as did appellant. Indeed, the regulations adopted while the Solicitor's appeal was pending restate in identical terms the provisions of Section 150.423 (App. 12).

(b) The Solicitor's appeal was not personally considered by the Postmaster General, but by his delegate, the Deputy Postmaster General. Appellant argues that authority to issue orders under 39 U.S.C. 259a cannot be delegated by the Postmaster General without authority from Congress. The short answer to this contention is that the Postmaster General has been authorized by Congress "to delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate". Section 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066. Referring specifically to this statutory provision, the Postmaster General, by general order No. 55507, dated January 13, 1954 (App. 14), authorized the Deputy Postmaster General to execute "all powers, functions and duties conferred by law upon the Postmaster General * * *".

The acts of Assistant Postmasters General "are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief." *United States* v. *Warfield,* 170 Fed. 43, 45 (C.A. 4); see *M'Collum* v. *United States,* 17 C. Cls. 92, 101-102. This court has sustained delegation of authority to subordinate officials in the Post Office Department in cases challenging the legality of the dismissal of Postmasters appointed by the President. *Hargett* v. *Summerfield,* U.S. App.

D.C. , 243 F. 2d 29, certiorari denied, 353 U.S. 970; *Moroney* v. *Abrams,* U.S. App. D.C. , 244 F. 2d 21, certiorari denied *sub nom. Moroney* v. *McKibben,* No. 339, October Term, 1957.

(c) Appellant insists that the order is invalid because the regulations governing proceedings under the Administrative Procedure Act announced on January 13, 1954 were not published in the Federal Register. This argument is without merit. First, appellant was on actual notice of the terms of the amendments—copies were sent to it within three weeks after the regulations were adopted. Cf. *Borak* v. *Biddle,* 78 U.S. App. D.C. 374, 141 F. 2d 278. Second, the procedures followed in this case were, in any event, closely parallel to the procedures set forth in the earlier proceedings published in the Federal Register (17 F.R. 9983). Appellant was not prejudiced in any way by the fact that the regulations were not published in the Federal Register. His entire objection is *de minimis.*

(d) Appellant contends that it has been denied a fair hearing because the appeal in this case was not conducted in accordance with the principle of separation of functions set forth in Section 5 of the Administrative Procedure Act (5 U.S.C. 1004(c)). We have great difficulty in followed this argument. As we understand it, appellant is saying that the complainant in the administrative proceedings, the Solicitor of the Post Office Department, is also the legal advisor to the Postmaster General, and he therefore cannot undertake any prosecuting functions. But the language of Section 5 does not prevent the general counsel of an agency from functioning as a prosecutor in adversary administrative proceedings. It simply states that no employee engaged in prosecuting or investigating functions in a particular case "shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review." 5 U.S.C. 1004(c). This record is devoid of any evidence that the Solicitor or his subordinates gave advice to the Deputy Postmaster General about the appeal pending before him. Accordingly, appellant's objections are without foundation.

Certainly, there is no comparison between the record in this case and the record before the Supreme Court in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33.

(e) Appellant complains of the reversal of the Hearing Examiner's decision on the ground that the Examiner's findings are entitled to great weight upon review. We agree that such findings, when adopted as the final agency decision, are indeed entitled to great weight. But it is their adoption as the agency decision which gives them their controlling effect. Until they are so adopted, they are merely an initial recommendation. Thus under Section 8 of the Administrative Procedure Act a hearing examiner's findings and recommendations become the final agency decision only after the time provided for an appeal to the agency has expired (as in Sec. 150.422(c) of the regulations governing the administrative proceedings in this case (App. 9)). On the other hand, "[o]n appeal from a review of the initial decisions of such officers *the agency shall,* except as it may limit the issues upon notice or by rule, *have all the powers which it would have in making the initial decision.* 5 U.S.C. 1007a (emphasis added). To be sure, the decision of the Hearing Examiner is to be considered along with the rest of the record in determining whether there is substantial evidence to support the administrative determination. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 496. But the Supreme Court has also pointed out that: "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve." 340 U.S. 474, 496. In this case, the examiner found as a fact that appellant "is attempting to obtain remittances of money through the mails [for the 'Illustrated Encyclopedia']" (App. 134). This finding, taken in the light of the evidence showing that appellant was causing information about obscene matter to be deposited in the mails, was more than sufficient to sustain the final departmental decision, and the agency had ample authority under the Administrative Procedure

Act to enter a final decision contrary to the Hearing Examiner's.

(f) Finally, appellant contends that the Post Office Department is estopped from imposing civil sanctions against it, because it prevailed in a prior administrative proceeding charging fraud in connection with the sale of the "Illustrated Encyclopedia." The theory of this proceeding was that circulars deposited in the mails by appellant, represented the book to be obscene when in fact it was not. *Farley* v. *Simmons,* 69 App. D.C. 110, 99 F. 2d 343, 345, certiorari denied, 305 U.S. 651. Contrary to appellant's assertion, however, the subject matter of that case was not the same as the matter in this case. As shown in the opinion set forth in appellant's brief (Br. S-2, S-7), the prior proceeding turned upon certain circulars which appellant had deposited in the mails. This case involves different advertisements which appeared in magazines passing through the mails at a later time—ads whose content was different from the circulars involved in the earlier proceeding. There is no basis, therefore, for a finding of *res judicata.*

Furthermore, as the Hearing Examiner ruled (App. 106), the defense of *res judicata* is not available in administrative proceedings. In *Churchill Tabernacle* v. *Federal Communications Commission,* 81 U.S. App. D.C. 411, 160 F. 2d 244, 246, this Court, speaking through Chief Justice Groner, held that it is "well settled doctrine that *res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals; * * *." This principle applies whether the party urging estoppel or *res judicata* is an administrative agency (*Niagara Mohawk Power Corp.* v. *Federal Power Commission,* 91 U.S. App. D.C. 395, 202 F. 2d 190, 198, affirmed, 347 U.S. 239) or an individual complaining of agency action. *Jason* v. *Summerfield,* 94 U.S. App. D.C. 197, 214 F. 2d 273, 275-76, certiorari denied, 348 U.S. 840.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE COCHRAN DOUB,
Assistant Attorney General.

OLIVER GASCH,
United States Attorney.

SAMUEL D. SLADE,
HOWARD E. SHAPIRO,
Attorneys, Department of Justice,
Washington 25, D. C.

JANUARY, 1958

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—451943/P.O. 905